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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

IN THE

TWENTY-SECOND, TWENTY-THIRD, TWENTY-FOURTH, AND
TWENTY-FIFTH YEARS OF THE REIGN OF GEORGE III.

FROM THE MANUSCRIPTS OF

The Right Hon. SYLVESTER DOUGLAS,
J. BARON GLENBERVIE.

AND ALSO FROM THE MANUSCRIPTS OF

MR. JUSTICE LAWRENCE, MR. JUSTICE LE BLANC, MR. GEORGE
WILSON, &c.

VOL. III.

BY HENRY ROSCOE, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.

LONDON:

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1831.



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P R E F A C E.

IT was at one period the intention of Lord Glenbervie to complete the series of Reports originally published by him in the year 1782, by adding the Decisions of the Court of King's Bench, from Trinity Term, 21 Geo. III., to Michaelmas Term, 25 Geo. III., when the Reports of Messrs. Durnford and East commence. With this view he had prepared, in many instances, the statements of the cases, and had made notes of the arguments of counsel, and of the judgment of the Court.

Lord Glenbervie having relinquished the design of preparing these Reports for the press, the MSS. were placed in the hands of Mr. Serjeant Frere, the Editor of the 4th Edition of "Douglas's Reports," by whom considerable progress was made towards their publication. The statements of the whole of the cases in the fourth volume were prepared, and to many of them the arguments and judgments were added. The cases, from Michaelmas Term, 22 Geo. III., to Michaelmas Term, 24 Geo. III. (now comprised in the third volume), were, however, left almost untouched, either by Lord Glenbervie, or by Mr. Serjeant Frere.

In this state the MSS. were put into the hands of the writer of this Preface, accompanied by the contemporary note books of Mr. Justice Le Blanc, Mr. Justice Lawrence, and of Mr. George Wilson, through the liberality and kindness of H. P. Standly, Esq., and Thomas Le Blanc, Esq., the present Master of the Court of King's Bench. In addition to these highly valuable sources of information, he was furnished with two small volumes containing notes taken by Mr. Justice Buller and by Lord Glenbervie himself, and also with some of the note-books of Sir Thomas Davenport and of Mr. Bowyer. Several volumes of notes by an unknown hand, apparently taken with care and accuracy, were also added. From these copious materials the writer has compiled nearly the whole of the third volume, and has supplied the arguments and judgments in the fourth volume, not inserted by Mr. Serjeant Frere. In preparing the cases, he found the notes of Mr. George Wilson most valuable for their fulness and apparent correctness, and by a collation of these with the copious notes of Mr. Justice Le Blanc, the third volume of the present Reports has been principally prepared, though the notes of the other contemporary reporters were frequently found useful in elucidating doubtful passages and in supplying deficiencies. The mode thus adopted of preparing the Reports was that which was practised by Lord Glenbervie himself, whose own notes do not appear to have been very copious, and who relied much upon the labours of his friends. "The judgments of the Court," he observes in his preface, "I could have

PREFACE.

wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither write short-hand nor very quickly. Memory, however, while the case was recent, supplied, at home, many of the chasms which I had left in Court; and by comparing and, as it were, confronting a variety of notes taken by others with my own, I was frequently enabled to recall and insert in my report material passages which I should otherwise have lost."

Of a large proportion of the decisions reported in these volumes, short, and, in many cases, imperfect notes have been long before the profession, in various text-books, in the notes to later reported cases, and in the arguments of counsel. This circumstance will not affect the value of the present publication, when the distinction between the few lines in which a text-writer embodies the effect of a decision, and a full statement of the case, with the arguments of the counsel and the judgment of the Court, is considered. In some instances, copious and accurate reports of the cases are to be found, as in the settlement cases reported by Mr. Caldecott, between Trinity 22 Geo. III. and Trinity 24 Geo. III. These have been omitted in the preparation of the third volume, and a reference substituted to Mr. Caldecott's Reports. In every instance, indeed, where a note or report of the same case has appeared, a reference to the volume in which it is inserted will be found.

For the notes appended to the cases in the third volume, and for those which occur after page 190 in the fourth volume, the writer of this preface is responsible. His object in adding them has been to state, as succinctly as possible, the later decisions upon the points to which the principal case refers.

H. R.

Temple,
October, 1831.

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C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE

TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.

REX v. INHABITANTS OF LANGHAM.

(Reported Caldecott, 126.)

1781.

Saturday,
10th November.

PLANTAMOUR and others v. STAPLES (a).

THIS was an action on a policy of insurance of the ship *Duras*, "at and from *Marseilles* to *Madeira*, the *Cape*, and the isles of *France* and *Bourbon*, and to all ports and places where and whatsoever in the *East Indies* and *Persia*, or elsewhere beyond the *Cape of Good Hope*, from port to ports, and from place to places; and during her stay and trade at all ports and places, and until her safe arrival back at her last port of discharge in *France*, upon any kind of goods, and also upon the body, &c. of the ship."

There was also a count for money paid, laid out, and expended. The cause was tried before Lord MANSFIELD at *Guildhall*, at the sittings after *Trinity Term*, and a verdict was found for the plaintiffs for £66 13s. 9d. subject to the opinion of the Court on the following case:

The plaintiffs are merchants at *Geneva*; and on their own account and risk, by means of their agents at *Marseilles*, were interested in bullion, and goods, and merchan-

(a) *S. C. 1 T. R. 611 (n)*; but without the arguments of counsel.

VOL. III.

Tuesday,
13th November.

Insurance of ship *Duras*, "at and from, &c. during her stay and trade, &c. until her safe arrival back at her last port of discharge, &c. upon any kind of goods, and upon the body, &c. of the ship." The ship being lost on the voyage, the goods were transhipped and forwarded by another vessel. Held that the underwriters were liable for an average loss on the goods, arising from the capture of the last-mentioned vessel.

B

1781.

PLANTA-
MOUR
v.
STAPLES.

dizes shipped there on board the ship *Duras*, consigned to the plaintiffs' correspondents at *Pondicherry*, with directions to barter or sell the same on their account, and to make all the returns on the same to *Europe* in other goods, the produce or manufacture of *India*. The plaintiffs were also interested in the said ship *Duras*. The ship *Duras* sailed from *France*, on the voyage insured, in *June*, 1776, and in the outward-bound voyage was totally lost at the *Isles of France* in *April*, 1777. The goods on board the said ship sustained damage, but great part of the bullion, and a considerable part of the goods, were saved, and, without any authority from the underwriters, sent forward in another ship to the plaintiffs' correspondents at *Pondicherry*, who received and disposed of the same, and, under the plaintiffs' orders, invested the produce in other goods, the produce and manufacture of *India*, and shipped the same, to the plaintiffs' account, on board a ship called the *Père de Famille*, bound to *France*.

The *Père de Famille* sailed from *Pondicherry* for *France* in *August*, 1778, and in the course of her voyage home was condemned at the *Isle of France* as unfit to proceed to *Europe*; whereupon the plaintiffs' goods were put on board another ship, called the *Louisa Elizabeth*, bound for *France*; which ship, with the plaintiffs' goods so on board, sailed for *France*, and was afterwards taken by an *English* privateer, and has since, with all her cargo, been condemned.

On the 29th of *August*, 1778, several of the underwriters on the policy signed a memorandum thereon, whereby they agreed to run the risk on the goods saved, as aforesaid, in any other ship or ships until their safe arrival in *France*; but which agreement the defendant, and several others of the underwriters, refused to sign, or to give their consent to. The defendant has paid the whole of the average loss occasioned by the loss of the ship *Duras*, and by the damage of the plaintiffs' goods then on board of her.

By the capture of the ship *Louisa Elizabeth*, and of the plaintiffs' goods so on board her as aforesaid, the plaintiffs sustained a loss of £12 2s. 9d. per cent. on the sums subscribed on the said policy, which has been paid by all such of the underwriters as signed the memorandum of the 29th of *August*, 1778.

The questions for the opinion of the Court were,

Whether the defendant is liable to pay the said loss of

£12 2s. 9d. per cent. which the plaintiffs have so sustained by the capture and condemnation of the ship *Louisa Elizabeth* and her cargo; or if not, whether the plaintiffs are entitled to any, and what, return of premium?

Pigott, for the plaintiffs.—The plaintiffs are entitled to recover the whole loss. The only question is, whether this loss was occasioned by the loss of the first ship, the *Duras*. The object of the insurances to *India* is to cover the trade there and back, and to protect the goods in all their changes till their return to *France*. The loss of the *Duras* makes no difference, if nothing improper was done by the plaintiffs or their agents after that event. It is clear that if the *Duras* had arrived in safety in *India*, and the goods had been altered, and the same ship had brought back the new goods, the latter would have been under the protection of the policy. The transaction was fair, and the goods were disposed of to the best advantage. If the Court should be of opinion against the plaintiffs, still the voyage is divisible, and there must be a return of premium.

Haworth, for the defendant.—The policy is on goods on board the ship *Duras*. As soon as that ship was lost, the policy ceased; and the parties were entitled to claim a total or a partial loss, according to the circumstances. It was necessary, indeed, to take the goods which had been saved to a market, but the underwriters were not to run the risk of other goods in another ship. The underwriters have nothing to do with any subsequent voyage. With regard to the return of premium, *Bermon v. Woodbridge* (b) is decisive. Though several places are mentioned, there is but one voyage.

Lord MANSFIELD.—The question is, whether the ship to *Europe* was necessary to the salvage. It is admitted that the ship to *Pondicherry* was so. I see no doubt. It is also admitted that what was done was the very best that could be done. The purchase of other goods was necessary to get the money home. The underwriters are liable.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—I cannot find any case decided where this mode of bringing home the goods has been adopted; but in *Milles v. Fletcher* (c) it was determined generally,

(b) *B. R. T.* 21 *Geo.* 3, *ante*,
vol. ii. p. 781.

(c) *B. R. T.* 19 *Geo.* 3, *ante*,
vol. i. p. 231.

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that the captain has the power to do every thing for the benefit of all concerned (d).

Judgment for the plaintiffs.

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Devise by R. W. to his eldest son S. W., and the heirs of his body lawfully begotten; and, for default of issue of his said son S., then to his son H. W. and the heirs of his body. S. W. died in the lifetime of the testator, leaving issue. Held, that the devise to S. W. had lapsed, and that the remainder to H. W. vested in possession immediately on the death of the testator.

THIS was a writ of *error* from a judgment of the Court of *King's Bench* in *Ireland* in an ejectment for lands, &c. in the county of *Cork*, in which a special verdict had been found; and on that special verdict the Court of *King's Bench* in *Ireland* had given judgment for the lessor of the plaintiff, *Warner*, the present defendant *in error*. The special verdict stated (b),

That by settlement made on the marriage of *Simon White*, the father of *Richard White*, the lessor of the plaintiffs, certain lands, &c. in *Ireland*, were by *Richard White*, father of the said *Simon White*, settled on the said *Simon White* for life; remainder to his first and other sons, in tail male; remainder to the said *Richard*, the father of the said *Simon*, in fee: and certain other lands were, by the same deeds, settled on the said *Simon*, in tail male; remainder to the said *Richard White*, the father, in fee. *Simon White* entered by virtue of the settlement, and the marriage took effect. The said *Richard White*, the father of *Simon*, being seized of part of the estate which was not comprised in the settlement, and being also seized of other lands and tenements in the county of *Cork*, and having issue the said *Simon White*, his eldest son, and *Hamilton White*, his second son, the present plaintiff *in error*, and a daughter, *Margaret*, married to *Richard Longfield*, esquire, and no other issue, by will, dated the 1st of *January*, 1775, after devising estates of the annual value of £160 to *Richard White*, the lessor of the plaintiff, in tail general, the rents to be paid him from the time of sixteen years of age, and

(d) See *Read v. Bonham*, C. without the arguments of counsel. *Ante*, vol. i. p. 345 (n); *B. & M.* 2 *Geo.* 4. 3 *B. & Bingham*. 147, 8 *Taunt.* 775, S. 11 *East*, 551 (n).
C; *Morris v. Robinson*, B. (b) See the special verdict more fully stated, 3 *Br. P. C.* R., T. 5 *Geo.* 4, 3 *B.* and C. 435, 2d edit.
196; 5 *D.* and R. 35, S. C.

(a) S. C. 6 T. R. 517; but

estates of £100 per annum to his two next grandsons, brothers of the said *Richard White*, the lessor of the plaintiff, and an estate at *Carberry* to his son *Hamilton*, the plaintiff *in error*, in tail general, remainder to *Simon White* in tail general, remainder to *Margaret Longfield* in tail general, remainder to his own right heirs, devised all the rest and residue of his estate in the manor, lands, and town of *Bantry*, in the county of *Cork*, that had not been already settled on his eldest son *Simon White*'s marriage, and all his right, title, &c. to the said manor, &c. together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *Simon White*, and the heirs of his body lawfully begotten; and for default of issue of his said son *Simon*, then he devised his said entire estate of *Bantry* to his son *Hamilton White*, the plaintiff *in error*, and the heirs of his body; and for default of issue of his said son *Hamilton*, then he devised his said entire estate of *Bantry* to his daughter, *Mary Longfield*, for her life, and after her death to the heirs of her body; remainder to the said testator's own right heirs; and made his said eldest son, *Simon White*, his sole executor, and residuary devisee and legatee. *Simon White*, the testator's eldest son, died on the 2d of *September*, 1776, in the lifetime of his father, the said testator, *Richard White*, leaving issue of the said marriage the lessor of the plaintiff, his eldest son and heir, under age, and three other sons, and four daughters. The said *Richard White*, the testator, died on the 27th of *September*, 1776, without altering his will, having been informed of and knowing the death of his said son *Simon*. The said *Richard White*, the testator, had been a barrister. *Hamilton White*, the plaintiff *in error*, was, at the time of the making of the will of the said *Richard White*, about thirty-five years old, and had never been married. The estate comprised in the settlement was of the annual value of £1008; and the lands, &c., mentioned in the ejectment, of the annual value of £2300. The plaintiff *in error*, *Hamilton White*, after the death of his father, took possession of the several premises in *Bantry*, not settled on the marriage of *Simon*; for which this ejectment was brought in the Court of *King's Bench* in *Ireland* in 1780, on the demise of *Richard White*, the eldest son and heir of *Simon White*, and the testator's grandson.

The writ of *error* was argued in *Trinity Term* last by

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Davenport for the plaintiff *in error*, and by *Bower* for the defendant *in error*; and again in this term by *Wallace*, Attorney-general, for the plaintiff *in error*, and by *Wilson* for the defendant *in error*.

For the plaintiff *in error* were cited the following cases: *Brett v. Rigden* (c), *Hartop's case* (d), *Fuller v. Fuller* (e), *Hutton v. Simpson* (f), *Goodright v. Wright* (g), *Hodgson v. Ambrose* (h). By these cases, it was contended two rules were established: 1. That a devise is void where the devisee dies in the lifetime of the testator; 2. That the devise over, in such case, vests immediately in the next taker.

The question in the present case is; whether the eldest son of *Simon*, the eldest son of *Richard White*, the testator, or *Hamilton*, the second son of the testator, is entitled to the lands not comprised in the settlement, and devised to *Simon*; that is, whether, by the death of *Simon*, the devise to him and his issue is lapsed, and becomes vested in *Hamilton*. The present case is attempted to be distinguished from the authorities above cited; and it is said, that here the first devise is to the heir-at-law of the testator; which alters the case; because, by the words of the will, the second son is not to take until after failure of issue of the first son; and this distinction is founded on a *dictum* of *POPHAM, J.*, in *Fuller v. Fuller*. This question, however, could not arise in *Fuller v. Fuller*, and therefore the opinion of *POPHAM* was extrajudicial. If that *dictum* has any meaning, it shows that the issue must take by purchase; for unless they took by purchase, the next limitation to the second son could not take effect: as a contingent remainder it could not, for want of a particular estate to support it; and as an executory devise it could not, for it would be too remote. The consequence then would be, that this devise would be construed in a different sense from the other devises in the very same words. If, on the contrary, the eldest son of the first devisee took an estate by descent, he would take an estate in *fee*, which would be a larger estate

(c) *C. B.*, *H. 7 Eliz.*, *Plowd.* 397; 2 *Vern.* 722; *Prec. in Ch.* 439; *Eq. Ca.* 216. *S. C.* 340.

(d) *B. R.*, *T. 33 Eliz.*, *Cro. Eliz.* 243.

(e) *B. R.*, *H. 36 Eliz.*, *Cro. Eliz.* 422.

(f) *Canc.* 1717, 1 *P. W.*

(g) *B. R.*, *H. 1717*; 1 *P. W.* 397; 1 *Str.* 25, *S. C.*

(h) *B. R.*, *E.* 20 *Geo. 3*; *ante*, vol. 1. p. 337.

than the will intended. It has been said, that no precise case has been stated where the lapsed devise was to an heir-at-law; but in *Hutton v. Simpson* there were two daughters who were coheiresses, which amounts to the same thing. In *Hodgson v. Ambrose* the Court asked the counsel, whether he contended that the first devise was not lapsed; and he replied, that he could not, after the decision in *Goodright v. Wright*. In the present case it has happened that the heir is not totally unprovided for, having another estate under the settlement; but that circumstance could make no difference.

On the other side, for the defendant *in error*, in support of the judgment of the Court of *King's Bench* in *Ireland*, it was thus argued: The eldest son of *Simon White*, the eldest son of the testator, is entitled to this property as heir-at-law of the testator. The question depends upon two well-established rules: 1. That an heir-at-law is not to be disinherited but by express intention; 2. That what is not given away descends to the heir-at-law. There is a plain distinction between a devise of this kind to a stranger and to an heir-at-law—a distinction founded in plain sense, and supported by decided cases, and by the *dicta* of judges. A stranger can only look to the will for his title; but an heir-at-law looks to the will, not for his title, but to see in what manner it is given away from him. Where the devise is to a stranger, and, for want of issue, to another stranger, it is the plain intention of the testator to give nothing to the heir. But where the first devise is to the heir-at-law, the case is entirely different. *Hartop's case* is strong for the plaintiff *in error*. The Court refused to resolve the case, but awarded a *melius inquirendum*; which must have been on account of some fact extrinsic of the will, and could only have been to inquire whether the first devisee was the heir-at-law of the testator. The *dictum* in *Fuller v. Fuller* is not an extrajudicial opinion, but an explanation of the rules on which the Court grounded their decision. The opinion of *POPHAM, J.*, in that case, is not contradicted in any other case, or by any other *dictum*; but, on the contrary, is much confirmed by what fell from Lord *MACCLESFIELD* in delivering the resolution of the Judges in *Goodright v. Wright*, as reported in *Strange* (i). But it is said that the observa-

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tion of Lord MACCLESFIELD is omitted in the report in *P. Williams*, a contemporary reporter. It cannot, however, be supposed that *Strange* would insert what had never been said. In *Hutton v. Simpson*, the question was never decided. The *Chancellor* said, that it was a mere legal question, and that he would leave it to a court of law, and give no relief. Again, that was not the case of an heir-at-law, but of one of two coheirs, which is very different; for one of two coheirs takes the whole by devise, and not by descent; and it was so resolved in *Reading v. Royston*. [The *Attorney-General* said, that *Hutton v. Simpson* must have been decided, for that he himself had succeeded to part of the estate in question. *Wilson* replied that Lord COWPER's opinion had probably been acquiesced in.] *Goodright v. Wright* was the case of a stranger, and not of an heir-at-law; and so, probably, was the case of *Busby v. Greenslate (k)*: *Ambrose v. Hodgson* was a devise to one sister and the heirs of her body, remainder to another sister and the heirs of her body; and the sisters were not heirs-at-law of the testator, there being a brother alive.

It is said to be difficult to describe the interest which the heir-at-law will take, and that the testator did not intend him to take an estate in fee. Whichever way the case is decided, the intention of the testator cannot be wholly carried into effect. He clearly intended that the issue of the first devisee should take some estate; and the question is, whether his primary intent in favour of that issue, his heir-at-law, shall not prevail over his secondary intent. It cannot be denied that the will might have been so worded as to give an estate to the heir-at-law; as if the testator had said, "I give my estate to *A.* and the issue of *A.*; and when my estate so given to *A.* and his issue shall be spent, and the issue extinct, and not till then, I give it to *B.*," &c. Now the testator has said in his will what is tantamount to this. The general intent and scheme of the will require that the Court should thus construe the words used. It was the intent to give one estate to the elder, and another to the younger branch of the family. Upon the whole, then, it is contended, 1. that there is such a distinction between this case and all the decisions cited, as to take off their authority; and, 2. that there is a manifest intent of the testator to give nothing to

(k) *B. R., T. 7 Geo. 1; 1 Str. 445.*

the younger son till the issue of the elder son should be extinct, and that therefore till that time the estate goes to the heir-at-law.

Lord MANSFIELD, after stating the facts of the case, said,—The Court of *King's Bench* in *Ireland* gave judgment for the lessor of the plaintiff, the eldest son of *Simon*. In order to support that judgment, they must have gone upon the ground that the testator meant to provide for the contingency of his son dying in his (the testator's) lifetime, so as to give it to his children as purchasers. My wish decidedly has been to support the claim of the lessor of the plaintiff, and I have struggled hard to distinguish this case from the letter and meaning of the authorities, for no one can doubt that the testator's intent was to give the whole family estate together. His will is a continuation of the settlement, and he could have no idea of his eldest son's children being set aside in favour of his second son. At first, the argument of intention might have had weight; but the law on this head is now so settled, that it is impossible, even if it were wrong, to alter it. The case of such a death in the lifetime of the testator happens frequently. I have several cases now in my memory.

Consider what the settled law is. At common law, lands were not deviseable, and therefore little is to be found in the books, before the statute of wills, on the subject of devises of lands; but with regard to legacies of personalty it was early settled, that if the legatee died in the lifetime of the testator, the legacy lapsed, and no representative could claim in his right. If the legatee was not *in esse* at the time of the death of the testator, the legacy was gone (1). The first case as to the devise of lands, after the statute of wills, was *Brett v. Rigden*; where it was held that the word *heirs* was only used to describe the extent of the interest; and that the heirs not being the object of the testator's intent, the devise was lapsed and void. In *Hartop's case* the devise was of an estate tail with remainders over. Originally, perhaps, there might have been a distinction made between *Brett v. Rigden* and the case where the devisee is also the heir; but the authority of *Hartop's case*, and of *Fuller v. Fuller*, is strong against such a distinction, and every one claiming under a

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(1) *Elliot v. Davenport*, Canc. Atk. 86; *Maybank v. Brookes*, M. 1705, 1 P. W. 83; *Stone* Canc. M. 1780, 1 Bro. C. C. v. *Evans*, Canc. M. 1740, 2 84; *Lowndes on Legacies*, 408.

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will must take as a purchaser. It is said that there is no case where the first devise was to an heir-at-law; but that assertion does not appear to be correct; for in *Hutton v. Simpson*, and in an old case of *Packman v. Cole (m)*, the devisees were coheirs, and no notice is taken of the distinction. But supposing that the heir-at-law is to take, how is he to take? If, by implication, under the will, there is an end of the distinction of heir. He must then take by purchase, and is not more favoured than another. Does he then take by descent?—and if by descent, how? Does it descend to him in fee *quousque*? If so, it is still the same as if the first devise had been to a stranger. The last argument for the lessor of the plaintiff is, that as the heir cannot be disinherited without express words, the whole will is overturned. But the testator may disinherit his heir by giving the estate away from him, or by giving it to him in a qualified manner; and here he has disposed of it. I cannot get over the letter and reason of the authorities. To be sure there is a *dictum* of *Popham*, but that is out of the case. There is also another position of his which cannot be supported—that if land be given to a man and his heirs, and he dies, his heirs may take, which cannot be.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—I am of the same opinion. I think that the event which has happened was not provided for by the testator in his will. I incline to think that *Hartop's* case was that of an heir-at-law. Had it stood over on the ground suggested in argument, the Court could not have given the opinion they did. The *dictum* of *POPHAM* was not intended to be confirmed by Lord PARKER. He says, in the course of his argument, that *POPHAM* was mistaken. If he had laid down the distinction clearly, it is not likely that *Perry Williams* would have omitted it. As to the intent of the testator, he had no inclination in favour of the issue of his eldest son. It was the eldest son himself who was the object, and it is described in what manner he shall take. An estate by implication cannot be raised against an express devise. The case put for the lessor of the plaintiff will not hold. The words, “and not till then,” &c. would not carry the case any further. The limitation over would be a remainder, and would take effect immediately.

Judgment reversed.

Upon this judgment a writ of *error* was brought in Parliament (n), and after hearing counsel the following question was put to the Judges: "Whether, in the event which had happened, the defendant, *Hamilton White*, took any and what estate in the lands of *Bantry*, under the devise to him for default of issue of *Simon White*?" The Lord Chief Baron, having taken time to consider the question, delivered the unanimous opinion of the Judges present, that the defendant, *Hamilton White*, took an estate tail in the said lands, under the devise to him for default of issue of *Simon White*. Whereupon it was ordered and adjudged that the judgment of the Court of *King's Bench* in *England*, reversing the judgment of the Court of *King's Bench* in *Ireland*, should be affirmed (o).

(n) 3 Br. P. C. 435, 2d ed.; *Lindsey, v. Colyear, B. R., M. S. C.* cited *Jones v. Morgan*, 50 G. 3, 11 *East*, 547; *Brown Canc.* 1783, 1 Br. C. C. 219, *v. Higgs, Canc.* 1799, 4 *Ves.* 718.

(o) See *Doe*, dem. Earl of

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MOCATTA v. FRANCO.

Thursday,  
15th Nov.

THE defendant, being about to apply to government for part of a loan which was to be raised, offered the plaintiff, by letter, that he (the defendant) would let the plaintiff have £20,000 of the approaching loan in his (the defendant's) name; to which the plaintiff assented, provided that he should have the £20,000 if the defendant was not wholly excluded. The defendant applied to government for £200,000 of the loan, but had only £35,000 allowed him; on which he offered the plaintiff £3500 of it, being the proportion which £20,000 bore to £200,000, the whole sum which he had written for. On this the plaintiff sued the defendant on his promise, to recover the profit which he would have made on £20,000 if that sum had been allowed him by the defendant. The jury found a verdict for the plaintiff with £1800 damages, being less than the full profit on £20,000. A new trial was moved for on two grounds: 1. That it was *nudum pactum*; and 2. on the terms of the agreement. A rule to show cause having been obtained,

*Wallace*, A. G., *Dunning*, and *Morgan*, showed cause.—

*A.* offered to *B.* £20,000 of a proposed government loan; which *B.* agreed to take, provided he should have the £20,000 if *A.* was not wholly excluded. *A.* applied to government for £200,000, but had only £35,000 allowed him; whereupon he offered to *B.* £3500. Held that *B.* was entitled to receive from *A.* the whole £20,000.



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This is not a *nudum pactum*, for the plaintiff bound himself at all events to take a certain portion of the loan; and if it had been a bad thing he must still have taken it, and being a good thing he is entitled to the benefit of it. Besides, in consequence of this agreement the plaintiff does not enter into any other subscription from which he might have derived the benefit which he seeks to recover in this action. There was also a benefit to the defendant, for he was desirous of offering a large sum to government, which he would not have ventured to do without the participation of some other person, and the plaintiff refused to take any unless the defendant would give him the whole £20,000. They cited *Dutch v. Warren* (a).

*Beaucroft, Lee, Baldwin, and Erskine, contra.*—This demand is at all events ungenerous; and if any legal objection, however strict, can be made on the part of the defendant, the Court will be glad to attend to it. Taking this to be a contract, it is *nudum pactum unde non oritur actio*, for no advantage could be derived by the defendant from his suffering the plaintiff to have this sum. But it is said, that supposing it to have been a losing bargain, the plaintiff would have been compelled to take this portion of the loss off the defendant's hands. The answer is, that unless the plaintiff had taken this sum, the defendant would never have applied for so much to government, and there would have been no loss to be sustained by him. But supposing that it is not *nudum pactum*, the defendant has performed his contract according to the rational construction of it. It is obvious that the plaintiff was only to receive a certain relative proportion of the sum subscribed for: for suppose that government had only permitted the defendant to take a less sum than £20,000 it would have been impossible for him to have completed the contract according to the construction of it contracted for on the other side. Again, the defendant may be considered as an agent employed by the plaintiff in this transaction: and then it is sufficient to be done for him as well as for him. There is also another objection to this action. The contract is prohibited by the statutes against stock-juggling, 7 Geo. 2. c. 5. It is a contract for a share in a security which the defendant had not at the time of the contract.

Lord MANSFIELD.—In the argument it appears to be forgotten that we are to try the cause on the evidence. Whether the plaintiff acts honourably or not must depend upon the terms of the agreement. If he was to have only such a proportion as his sum should bear to the whole £200,000, he acts dishonourably; otherwise not. The first proposal did not come from the plaintiff. It was an offer made by the defendant, and the plaintiff accepted it on condition that he should have the sum for which he stipulated, if the defendant was not wholly excluded. This is the meaning of the agreement, which was made with a view to prevent the chance of the plaintiff having nothing at all. As to the consideration, if there is any, it is enough to take the case out of the rule of *nudum pactum*. Consider the mode of raising the loan. A few people only have lists, and government have nothing to do with the under-subscribers. The consideration is, that I answer to government, and you to me. It would be very inconvenient to hold that this is a *nudum pactum*. The defence of the stock-jobbing acts fails. This was a transaction before the terms of the loan were known.

The rest of the Court concurring,

The rule was discharged.

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PECKHAM v. FARIA (a).

Thursday,  
15th Nov.

THIS was an action of *assumpsit* for goods sold and delivered to one *Sylva* on account of the defendant. At the trial the only witness examined was the book-keeper of the plaintiff, who proved that the defendant and *Sylva* came to the plaintiff's warehouse and agreed on a parcel of goods for *Sylva*, when the plaintiff said he did not know *Sylva*, and would the defendant answer for him? The defendant said that he would guarantee the payment. *Sylva* came, on another occasion, by himself, and ordered other goods; on which the plaintiff sent to the defendant to inform him of it, and asked if the defendant would engage for *Sylva*. The defendant said, You may not only ship that parcel, but one, two, or three thousand pounds more, and I pay you if he does not." The goods were subsequently delivered to *A*. Held that this was a collateral promise by *B*., and required to be in writing by the statute of frauds.

*A*. and *B*. came to the plaintiff's warehouse and agreed on a parcel of goods for *A*., and *B*. said he would guarantee the payment. *A*. afterwards came alone and ordered other goods, when the plaintiff sent to *B*. and asked him whether he would engage for *A*. *B*. replied, "I will

(a) S. C. cited 2 T. R. 80.

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*will pay you if he does not.* This promise was made before the delivery of the goods to *Sylva*, and credit was given to the defendant's promise, the plaintiff knowing little or nothing of *Sylva*. For this last parcel of goods the action was brought. On the part of the defendant it was contended, that this promise, not being in writing, was void by the statute of frauds. Lord MANSFIELD, before whom the cause was tried, stated, that he believed the point had been already determined; but as no one at the bar recollected the case, a verdict was taken for the plaintiff, with leave for the defendant to move to set that verdict aside and to enter a nonsuit. A rule to show cause having been obtained,

*Wallace, A. G., and Dunning*, showed cause. They read the case of *Jones v. Cooper* (b), and admitted, that unless the present case could be distinguished from that decision, the rule must be made absolute. But they contended, that upon the evidence, as it appeared on the trial in this case, the credit was given to the defendant alone, and that this was not a collateral undertaking on the part of the defendant. The plaintiff knew nothing of *Sylva*, and expressly refused to trust him. Before *Jones v. Cooper*, the distinction of the promise being before or after the delivery of the goods was very material; and it is still very material in this sense, that it leaves the question, whether the goods were supplied on the credit of the person to whom they were delivered or of the defendant, open to the jury. That is a question proper for the determination of the jury, who have decided it, and the Court will not disturb the verdict. The jury also may have thought that the goods were delivered on the joint credit of the defendant and *Sylva*, and in that case also the verdict ought not to be disturbed. To hold a case like this within the statute, would be making the statute itself an instrument of fraud.

Lord MANSFIELD.—Before the case of *Jones v. Cooper*, I thought there was a solid distinction between an undertaking after credit given, and an original undertaking to pay, and that in the latter case the surety, being the object of the confidence, was not within the statute (c); but in

(b) *B. R., M. 15 Geo. 3, for goods sold and delivered, the case on evidence was this: the Cowp. 227.*

(c) See *Mawbrey v. Cunningham*, *Sittings after H. T. 1773*, *Holbroke*, a butcher, for six oxen: five were delivered, but

*Jones v. Cooper* the Court was of opinion, that wherever a man is to be called upon, only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance. Here, by the words of the promise, *Sylva* was to be called on first; the defendant undertaking to pay if *Sylva* did not pay. The case is not distinguishable from *Jones v. Cooper*, and the words of the statute are very strong.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—*Jones v. Cooper* was fully as strong for the plaintiff, for there the original debtor was known to be worth nothing.

Rule absolute (*d*).

the sixth was refused unless the money for it were paid, on which the defendant said he would pay the plaintiff for it next week at *Bristol* fair. On this promise the plaintiff delivered the sixth ox, which *Holbroke*, in company with the defendant, drove away.

BULLER, *J.*, held the case within the statute of frauds, on the authority of *Jones v. Cooper*, in which he said *Mawbrey v. Cunningham* had been overruled. *Parsons v. Walter*, *Bridgewater S. A.* 1781.

(*d*) "The general line now

taken is, that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds." *Per* BULLER, *J.*, *Watson v. Wharam, B. R., M.* 28 G. 3, 2 T. R. 81. See also *Anderson v. Hayman, C. B., H.* 29 G. 3, 1 H. Bl. 121; *Dixon v. Bromfield, B. R., M.* 1814, 2 Chitty Rep. 205; *Colman v. Eyles*, 1817, *coram* *Ld. Ellenborough*, 2 Stark. N. P. C. 62.

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JONES v. BARKLEY.

(*Reported ante*, vol. ii. p. 694 a.

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Friday,  
16th Nov.

GRANT v. PARKINSON (a).

Policy upon any kind of goods, &c. valued at £1000, being on profits expected to arise on the cargo of the ship in the event of her safe arrival at *Quebec*, and in case of loss the insurers agree to pay the same without any other voucher than the policy. Held that this policy was not void within the 19 G. 2. c. 37, but that the insured were entitled to recover.

THIS was an action on a policy of insurance at and from *Surinam* to *Quebec*, upon any kind of goods and merchandizes, and also upon the body of the ship *Providence*. The said goods and merchandizes, &c. for so much as concerns the assured, by agreement, are valued at £1000, being on profits expected to arise on the cargo of the above ship in the event of her safe arrival at *Quebec*; and in case of loss, the insurers agree to pay the same without any other voucher than this policy.

The cause was tried before Lord MANSFIELD at *Guildhall*, when the evidence was, that this ship was laden with molasses; and the plaintiff, having a contract to supply the army with spruce beer, would, if the ship had arrived, have made a profit of £1000 more than the sum insured, and that it was common to insure profits. A verdict was found for the plaintiff, with liberty for the defendant to move for a new trial. A rule having been obtained to show cause why the verdict for the plaintiff should not be set aside and a new trial granted,

*Haworth* and *Grant* showed cause. The statute, 19 Geo. 2, c. 37, enacts, "that no insurance shall be made on any ship, goods, merchandizes, or effects, interest or no interest, or without further proof of interest than the policy." This policy is neither within the words nor the spirit of the act, nor is it the subject meant by the act. The act mentions ship, goods, and merchandizes; but this policy is not on any of those things, but on the profits of a voyage (b). If, indeed, the policy were in fraud of the statute, this argument would not prevail, but here the plaintiff has an interest.

The objection here is not that there is no interest really, or that this is a wagering policy, but that there is a clause in the policy which makes it void within the statute 19 Geo. 2, c. 37; but here the clause immediately follows the valuation and refers to it. The statute was made against wagering

(a) *S. C. Park Ins.* 354, 6th ed.; *Marsh. Ins.* 97, 2d edit., shortly reported, and without the arguments of counsel. (b) See *Lucena v. Craufurd*, *Dom. Proc.*, 2 Bos. & Pul. N. R. 314, 321.

policies. In those policies there was no interest, and therefore the statute says that the policy alone shall be no proof of interest. The party is not precluded from showing his interest. On the statute of usury it has been held, that, though a bond purports to bear more than legal interest, evidence may be given to show that the transaction is fair. In *Glover v. Black* (c) the Court held, though that is not the point of the case, that the statute 19 Geo. 2. did not make any change in the manner of insurances, but that its view was to prevent gaming or wagering policies where the insurer had no interest at all.

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The *Attorney-General* and *Dunning, contra.*—The meaning of the statute 19 Geo. 2. was to prevent persons from making agreements like the one in question. But it is said that this policy is on the profits of a voyage, and that *profits* are neither goods, merchandizes, nor effects, within the statute; but the goods contain and include the profits, which are therefore provided for under the term goods. According to the construction contended for on the other side, it would only be necessary to avoid using the words “goods,” &c. and gaming policies might go on as before. It is attempted to show that the words of this policy mean *value*, and not interest. The words are, “the underwriters agree to pay the same without any other voucher than this policy.” Unless the policy is to prove the interest, it is to prove nothing. [*Per Cur.* What are the words of a valued policy?] “Valued at a certain sum, or the sum insured.” On such a policy the party always proves interest, and the policy is only considered as ascertaining the value; it dispenses with the proof of the amount of the interest, and not with the proof of any interest at all. Here, on the contrary, the policy dispenses with the proof of any interest at all: that is the case provided against by the statute, and the policy is void.

Lord MANSFIELD.—On argument, and after consideration, I have changed the opinion which I held at the trial, that this policy is void. Before the statute, nothing was so common as a valued policy; and then, at the trial, there was no necessity to prove either value or interest, whether the words “without further proof than the policy” were, or were not, added (d). Then this statute was made; and in

(c) *B. R.*, T. 3 G. 3, 3 *Burr.* *R. R.*, M. 39 G. 3, 8 T. R. 23; 1400. *Lucena v. Craufurd*, *Dom. Proc.*

(d) See *Craufurd v. Hunter*, 2 *Bos. & Pul. N. R.* 321; VOL. III. C

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the construction of it, it has been held, whether right or wrong it is now immaterial to inquire, that a valued policy is not void, but it is sufficient if the party proves some interest. The other side may show that this is a mere evasion of the act; but in general nothing is necessary on a valued policy but to prove some actual interest. In the present case the insurance is made by a contractor for spruce beer on the profits to arise from a cargo of molasses. If the ship arrives the profit is certain. The policy is not meant to conceal the interest, but to get rid of the proof of the *quantum*. I cannot distinguish this from the common case of a valued policy. The words of the statute are very strong, and so they struck me at *Guildhall*; and if it had been a new question on the validity of a valued policy, doubts might have been entertained; but it is not a new question.

WILLES, *Justice*.—This is not the case of a wager, nor does the policy pursue the words mentioned in the statute: it is a *bonâ fide* policy, and a real interest. It might be necessary to add more words in this policy than in the common valued policies, because the value of profits is less certain than that of goods. The words may be considered as surplusage, and rejected, so as not to vitiate the policy.

ASHURST, *Justice*.—I had a doubt at first, but I am now clear that these words are surplusage, and that the case is not to be distinguished from that of a valued policy.

BULLER, *Justice*.—The words are capable of both constructions, and therefore we must consider the meaning of the parties as it is to be collected from the face of the instrument, and there it appears that they meant to insure a real interest. It is not a necessary construction that *voucher* should mean proof of interest, and if another meaning consistent with the intent of the parties can be given, the Court will adopt such meaning.

Rule discharged (*e*).

*Cousins v. Nantes, Exch. Cham.*  
*E. 51 G. 3, 3 Taunt. 523.*

(*e*) As to the insurance of profits, see *Le Cras v. Hughes*, *E. 22 G. 3, post*; *Henrickson v. Margetson, B. R., M. 17 G. 3, 2 East, 550 (n)*; *Barclay v. Cousins, B. R., T. 42 G. 3, 2 East, 544*; *Hodgson v. Glover, B. R., E. 45 G. 3, 6 East, 316*;

*Lucena v. Craufurd, Exch. Ch., H. 42 G. 3, 3 Bos. & Pul. 75*; *Dom. Proc. 2 Bos. & Pul. N. R. 269, S. C.*; *King v. Glover, C. B., T. 46 G. 3, 2 Bos. & Pul. N. R. 206*; *Eyre v. Glover, B. R., M. 53 G. 3, 16 East, 218*; *3 Campb. 276, S. C.* Where not only the profits are an expectation, but the obtaining a cargo,

out of which the commission constituting the profits is to arise, is also an expectation, the interest is not an insurable interest within the 19 G. 2; c. 37.

*Knox v. Wood. M. Sitt. at Guildhall, 1808, cor. Lord ELLENBOROUGH, Park, Ins. 356, 6th ed.*

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JOHN WALKER, Assignee of JOHN CLARE, v. OBADIAH REEVE, Assignee of JOHN COBLEY (a).

Friday,  
16th Nov.

**C**OVENANT.—The declaration stated, that by indenture of 17th December, 1777, *John Clare* covenanted, promised, and agreed, to and with *John Cobley* (in consideration of the charge and expense which the said *John Cobley* would be at in erecting, on the piece of ground thereafter mentioned, such number of messuages, &c. and in such manner as *Sir Joseph Mawbey* should think proper, and in consideration of the yearly rents, covenants, and agreements thereafter reserved and contained), that he the said *John Clare*, in case such number of messuages, &c. were so built to the good liking of the said *Sir Joseph Mawbey*, and he the said *Sir Joseph Mawbey* should grant him the said *John Clare* a lease thereof, should and would, within one month after such lease should be so granted, demise, lease, and to farm let, unto the said *John Cobley*, his, &c., all that piece or parcel of ground situate, &c., and also such messuages, &c., so to be erected on the said piece of ground thereby agreed to be demised, within one month after the said *Sir Joseph Mawbey* should have granted him the said *John Clare* a lease thereof, but not sooner; to hold the said piece of ground, messuages, &c. unto the said *John Cobley*, his, &c. from the feast day of *St. John the Baptist*, 1775, for the term of sixty years, or sixty-one years, if the said houses so to be built should be to the good liking of the said *Sir Joseph Mawbey* and *John Clare*, or one of them; and if he the said *Sir Joseph* should grant him the said *John Clare* a lease thereof, but not otherwise. He the said *John Cobley* nevertheless, in the meantime, and until such lease should be so granted, yielding and paying for the same unto the said *John Clare*, his, &c. a yearly rent of a pepper-corn

The assignee of a lease for years, who has assigned over, is discharged from the covenant to pay rent, before the entry of his assignee.

(a) S. C. imperfectly reported, *ante*, vol. ii. p. 462.



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for the first three years of the said term, and for the remaining fifty-seven years of the said term the yearly rent of £21 (payable quarterly); the first quarterly payment to be made at *Christmas* then next ensuing. And the said *John Cobley*, (in consideration of such covenant and agreement of the said *John Clare* for granting a lease of the said piece of ground, &c. so soon, or within one month after the said Sir *Joseph Mawbey* should grant him a lease thereof, but subject to such objection of the said Sir *Joseph*, or *John Clare*, as aforesaid), did covenant, promise, and agree, to and with the said *John Clare*, that he the said *John Cobley*, his, &c. should and would, yearly, during the last fifty-seven years of the said term thereby granted, pay to the said *John Clare*, his, &c. the clear yearly rent of £21, according to the reservation aforesaid, *prout*, &c.

That the said *John Clare*, at the making of the said indenture, was possessed of and in the said demised ground, &c. for the remainder of a certain long term of years, whereof more than the said term mentioned in the said indenture was then to come and unexpired; and that the said *John Cobley* entered and was possessed.

That the said *John Cobley* being so possessed, and the reversion, as aforesaid, belonging to the said *John Clare*, he the said *John Clare*, by indenture of the 18th *June*, 1778, (profert of one part), in consideration of five shillings and other considerations therein specified, assigned to the said *John Walker*, his, &c. all the estate, right, title, &c. of the said *John Clare*, of and in the said demised premises, &c. To have and to hold, &c.

That afterwards, viz. on the day and year last above mentioned, the said demised premises, by assignment then and there duly made, came to and vested in the said *Obadiah Reeve*, by virtue of which the said *Obadiah* entered and was possessed, the reversion belonging to the said *John Walker*.

The breach assigned was, that, on the 29th *September*, 1779, £26, 5s., for one year and a quarter's rent, became due.

The defendant pleaded, 1. That the said Sir *Joseph Mawbey* hath not, at any time hitherto, granted to the said *John Clare*, or to the said *John Walker*, or either of them, any lease of the said premises, or any part thereof, with a verification; 2. That before the said £26, 5s., or any part thereof, became due, viz. 16th *September*, 1778, the defendant assigned to one — *Riggs*, by virtue whereof the

said — *Riggs* entered and was possessed thereof, with a verification.

To the first plea the plaintiff demurred; to the second he replied, that the said *Obadiah* continually, from and after the time when the said demised premises came to him, by assignment, as aforesaid, until, and at, and after, the said 29th of *September*, 1779, when the said £26, 5s. became due, remained and continued in the possession of the said premises, without this, that the said — *Riggs*, at any time before the said £26, 5s. became due as aforesaid, entered into the said premises, and was possessed thereof.—  
Verification.

To this replication the defendant demurred specially, and assigned for cause, that the plaintiff had therein traversed, and attempted to put in issue matter of law only, and not any matter traversable or issuable.

*Bower*, for the plaintiff.—It is clear that the first plea is bad. The defendant, so long as he continues in possession, is liable to the payment of the rent.


With regard to the replication, the question is, whether the assignee of a lease, who assigns over, does not continue liable to the payment of the rent until another actually enters and takes possession. The point was much considered in *Eaton v. Jacques* (b); and the only difference between that case and the present is, that in that case the action was against the second assignee. It was laid down in that case, that there are only two ways in which the defendant can be held liable, viz., on privity of contract, or on privity of estate. Here, there is no privity of contract; and to privity of estate enjoyment is necessary. It is admitted by the demurrer, that the defendant remained in the possession of the premises; his assignee cannot therefore be charged on the privity of estate, and the defendant himself consequently continues liable.

*Chambre, contra.*—The first plea turns upon the construction of the deed, and whether the covenant for the payment of rent is absolute or conditional. To construe it to be an absolute covenant would be absurd, for in that case *Cobley* would have to pay rent without having any term in the premises. The rent is expressed to be payable *during the term*; so that if no term passes, no rent is payable. If

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(b) *B. R., M. 21 G. 3, ante*, vol. ii. p. 438.

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no term passed, it is impossible that the defendant can be charged as assignee; for if nothing passed by the deed (and it does not profess to demise any thing) there cannot be any privity of estate. The first plea, therefore, is good, for it shows that the condition upon which the liability of the covenantor was to arise has never been performed.

With regard to the second demurrer, it is not necessary to controvert the case of *Eaton v. Jacques*. This is an absolute assignment: there the Court proceeded chiefly on the ground that the assignment was by way of mortgage, and intended only a security; the sole argument applicable to an absolute assignment is the form of pleading. But though the form of pleading is in favour of the plaintiff, yet there is no instance of a traverse of the possession, which shows that it is an immaterial allegation; like a request to pay a debt, and many circumstances of time and place. Two cases have occurred in *Chancery* in which that Court was clear that no entry was necessary to charge an assignee. *Sparkes v. Smith* (c), *Pilkington v. Shaller* (d): The interest, which came to the defendant by assignment, passed out of him by the assignment to *Riggs*. He has only the naked possession left, and no privity of estate. *Saffyn's case* (e), *Litt. 5. 289. Co. Litt. 46 b.* It is not necessary here to determine the case of a fraudulent assignment; where fraud is relied upon, it must be averred. *Anon.* (f), *Le Keux v. Nash* (g). There is no inconvenience to the lessor; he has every remedy that he was entitled to at the time of the making of the lease: he has his remedy against the original lessee and his representatives.

*Bower*, in reply.—No precise words are necessary to constitute a lease. Here there are all the requisites: an absolute stipulation for a lease for sixty years, and an averment in the declaration, that, at the time of the demise, the lessor had a longer term than that which he demised. The distinction taken between this case and that of *Eaton v. Jacques* does not exist. As soon as a mortgage becomes absolute, a court of law can take no notice of an equity of redemption. If *Eaton v. Jacques* be law, there must be

(c) *Canc. M.* 1692, 2 *Vern.* 124.  
 275.  
 (d) *Canc. T.* 1700, 2 *Vern.* 1 (f) *B. R., T.* 30 *Car.* 2,  
 374. *Vent.* 329, 331.  
 (g) *B. R., H.* 18 *G.* 2, 2 *Str.*  
 (e) *B. R., E.* 3 *Jac.* 1, 5 *Rep.* 1221.

judgment for the plaintiff. It is true, that an assignee, for many purposes, is in before possession, but not for the payment of rent. The case from *Ventris* shows that a replication like the present may be supported.

*Cur. adv. vult.*

Lord MANSFIELD now delivered the opinion of the Court.—After stating the pleadings, he said: The first question is, whether there is any lease at all, or any rent payable; and upon that there may be some doubt: therefore we shall say nothing upon it, as being unnecessary to the judgment we are about to give. But, taking it for granted that the defendant is assignee of the lease, the second plea is, that before any rent became due he assigned the premises to one *Riggs*, who entered, and was possessed. The replication states, that the defendant is, and continues, in possession, and denies that *Riggs* ever entered, or was possessed; and there is a demurrer to this replication. We are all of opinion, that the averment of the assignor continuing possessed, and the denial of *Riggs*'s entry and possession, are not good unless the replication had gone further, and averred fraud: that might have been sufficient, for fraud vitiates every thing (*h*). Unless fraud be averred, the assignment gives the assignee a title and a possessory right. With regard to the actual possession, it depends upon the nature of the property whether it can take place: the property may be waste, which seems to be the case here. It does not resemble the case of a mortgagee, for there, from the nature of the transaction, it is not an assignment for this purpose. Until the mortgagee calls for the possession, it remains with the mortgagor, and it is understood by both that the mortgagee shall not be liable for the rent (*i*). To have determined otherwise would only have been to have driven the mortgagee elsewhere for relief. For these reasons we are all of opinion against the replication, and that there must be

Judgment for the defendant.

(*h*) See *Taylor v. Shum*, C. B., E. 37 G. 3, 1 B. & P. 21.

(*i*) But in *Williams v. Bosanquet*, C. B., E. 59 G. 3, 1 B. & B. 238; 3 B. Moore, 500. S. C. it was held, contrary to *Eaton v. Jacques*, that where a

party takes an assignment of a lease, by way of mortgage, as a security for money lent, the whole interest passes to him, and he becomes liable, on the covenant, for payment of rent, though he has never occupied, or become possessed in fact.

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REX v. INHABITANTS OF WESTMEON.

(Reported, Caldecott, 129.)

Saturday,  
17th Nov.

BENFIELD v. PETRIE (a).

Where a true bill for perjury had been found against two of several witnesses upon whose evidence a verdict had been obtained, the Court refused to grant a new trial.

Before a new trial can be granted, a probable ground must be laid to show that the verdict was obtained by perjury.

**THIS** was an action of debt on the statute against bribery, for bribery at the *Cricklade* election, tried before **BULLER, J.** A verdict having been found for the plaintiff, a rule to show cause why there should not be a new trial had been obtained on an affidavit of the defendant, which stated, that two of the plaintiff's witnesses at the trial, whose names were *Wilks* and *Skilling*, had been indicted for perjury in this cause, on the evidence of several persons (not naming them), and that true bills had been found.

*Wallace, A. G., Morris, and Batt*, showed cause.—They contended, that before a new trial could be granted, the witness must not only be indicted, but convicted of the perjury; and that a new trial could not be granted on this ground unless the only witness, or all the witnesses, if more than one, were convicted. At all events, it ought to have been shown to the Court in what the perjury consisted, as it may have been in some very immaterial point, which could not have affected the verdict. It should also have been stated upon whose evidence the indictment was found; for it does not appear that they were not present, or might not have been examined at the trial, or, indeed, that they were not actually examined, and their testimony discredited. They cited a case of *Atherton v. James and others* (b), where a motion was made to stay proceedings till the event of an indictment, which had been found against the only witness on the side of the verdict, for perjury at the trial, should be determined, when the Court refused a rule to show cause.

*Dunning, and Rooke, S., contra.*—The object of this application is to keep alive the verdict till the defendant shall be able, by conviction for the perjury, to set it wholly aside.

(a) *S. C.* cited *Tidd's Pr. case*, 265.  
938. 8th ed. *Petrie's Cricklade* (b) *M. 14 G. 3.*

It is not law, as stated on the other side, that it is not sufficient, in order to set aside the verdict, to convict one witness out of many; for as the Court cannot determine on whose evidence the jury found their verdict, the conviction of any one is a sufficient ground for a new trial. This is an application to the Court made upon affidavits, yet the other side are not able to produce a single person to support, by affidavit, the testimony of the witnesses who have been indicted. It is objected, that the finding of the bills is on an *ex parte* examination; but it is the only means at present in the defendant's power of proving the perjury. The witnesses indicted were the only witnesses who proved absolute directions by the defendant to bribe, or an adoption by him of the bribery afterwards; they therefore stand here as the only witnesses upon whose testimony the verdict proceeded; for general evidence of agency is not sufficient to support a conviction for bribery. There must be special directions to bribe, or a recognition of the act of bribery afterwards. With regard to *Atherton v. James*, there might be particular circumstances in that case to induce the Court to refuse the rule, as if the cause had been tried at the sittings two or three days only before the application, and the Judge who tried the cause was convinced either that the evidence of the witnesses was immaterial, or that it was true beyond a doubt. [The Court asked for a copy of the indictment against these witnesses, but the plaintiff's counsel said that the clerk of the peace had refused them a sight of it, and it was not produced by the other side.]

Lord MANSFIELD.—This is an action for bribery. All the facts given in evidence go on the ground that two persons were agents, and that the bribery was committed by them. Evidence of these facts was given by seven or eight persons besides the parties indicted, and both the persons who bribed were examined, for the defendant, at the trial. The jury found a verdict for the plaintiff against the evidence of these two persons, on grounds which impeach that evidence. The Judge who tried the cause is satisfied with the verdict, and therefore it stands as a verdict with the weight of evidence in its favour. The motion for a new trial rests solely on the ground, that two of the witnesses have been indicted for perjury. It is not an established rule, that it is of course to stay a verdict because the witnesses in support of that verdict

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have been indicted for perjury. *R. v. Heydon (c)*. We are not told what the perjury assigned is, nor who are the witnesses in support of the indictment, and yet the defendant might have furnished the Court with this information. In order to obtain this rule, a probable ground must be laid before us, to show that the verdict was obtained by perjury. If general agency is proved, it is sufficient evidence to be left to a jury without proof of a command given by the principal to bribe, or a recognition of the particular fact of bribery by him afterwards.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—I am of the same opinion. I left it to the jury on the evidence of general agency. It was for the jury to judge whether the fact came within the authority of the agent.

Rule discharged.

(c) *B. R., E. 3 G. 3, 1 Black. 404.*

Wednesday,  
 21st Nov. (a).

Motion for new  
 trial on the  
 ground of  
 perjury.

MACPHERSON v. PETRIE.

THIS was a motion for a new trial in a like cause and on a like ground as the above case of *Benfield v. Petrie*. In this cause the verdict went on the evidence of one *Trueman* as to a particular fact, and of *Skilling* as to general agency.

LORD MANSFIELD.—There is no sufficient ground to vary from the rule laid down in the last case. All the objections to the evidence of *Trueman* were open to the jury on the trial. It is said that the plaintiff might have had the copy of the indictment here; but the answer is, that it is incumbent on the defendant to produce every thing in support of his own application.

Rule discharged.

There were several other cases which stood on the same ground, and shared the same fate as the above two, without further argument.

(a) This and the following in point of time, as they relate case are given out of their order to the preceding case.

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PETRIE v. MILLES.

**T**HIS was an application of the same nature, arising out of the same transactions, but the motion in this case was made not only on the ground of indictments for perjury found, but also on the ground of surprise in going to trial, and that one of the witnesses for the plaintiff, who had been indicted, was a person not to be believed; to which several affidavits were produced. A rule to show cause having been granted,


Motion for new trial on the ground of perjury, or to stay proceedings.

*Dunning* showed cause.—He produced affidavits of steps having been regularly taken in the cause, so that there could have been no surprise; also affidavits to support the credit of the impeached witness, and other affidavits to discredit the persons who had made affidavits in support of the rule.

*Batt* and *Erskine* having been heard in support of the rule,

Lord MANSFIELD said, This application is made on three grounds: 1. That the defendant's attorney ill-used him, and neglected his cause, and that from the beginning the defendant knew nothing of the proceedings but the writ; 2. That had he known of the proceedings he could have overthrown the testimony of the witness against him; and, 3. If those grounds fail, the application is to stay the proceedings till after the trial of the indictment for perjury. As to the first ground, this motion is made through the intervention of another attorney, which is very proper if the former attorney neglected his duty; but it is admitted by the counsel at the bar that he did instruct them at the trial; therefore the defendant comes with a falsehood at the outset. Secondly, he says, if he had been apprised, he could have answered the plaintiff's case at the trial, for he has two witnesses who might have been produced; but it is not stated who those witnesses are, nor what they could have proved, nor is there any affidavit by them. Lastly, the defendant says that an indictment for perjury has been found against the witness for the plaintiff. This is another instance of the mischief which would ensue if proceedings were to be stayed in consequence of the finding of a bill for perjury. The bill is found entirely on *ex parte* evidence, and is no proof that the charge is true. Neither the nature of the



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perjury nor the names of the witnesses who are to support the indictment, are stated, but it appears that the defendant himself is one of those witnesses. The first instance in which an application of this kind was successful was in the case of the pagodas (*a*). It was a clear and certain perjury, and suspected by the Court at the trial, and the witness ran away.

These are all the grounds of the application. It seems a most audacious one, and the rule ought to be discharged with costs.

Rule discharged with costs (*b*).

(*a*) *Fabrilus v. Cock, B. R., M. 6 G. 3, 3 Burr. 1771.*

(*b*) The rule with regard to these applications is thus laid down by Mr. Tidd: "If the witnesses on whose testimony the verdict was obtained have been since convicted of perjury in giving their evidence, the Courts will grant a new trial; or, if a probable ground be laid to induce the Court to believe that the witnesses are perjured, they will stay the proceedings on the finding of a bill of indictment against them for perjury till the indictment is tried. The Court of Common Pleas in one case granted a new trial where the testimony of witnesses, on which a verdict had proceeded, was founded on, and derived its credit from, particular circumstances, and those

circumstances were afterwards clearly falsified by affidavit. But in general the finding of a bill of indictment for perjury is no ground for staying the proceedings before conviction, it being found on *ex parte* evidence; and the Court will not grant a new trial on the mere affidavit of one party contradicting the witnesses on the other side."

See *Aysheford v. Charlotte, H. 25 G. 3, post*; *Warwick v. Bruce, B. R., E. 55 G. 3, 4 M. & S. 140*; *Attorney-General v. Woodhead, Exch., M. 56 G. 3, 2 Price, 3*; *Feise v. Parkinson, C. B., M. 53 G. 3, 4 Taunt. 640*; *Harrison v. Harrison, Exch., H. 1 & 2 G. 4, 9 Price, 89*; *Thurtell v. Beaumont, C. B., M. 4 G. 4, 1 Bingh. 340*; *8 B. Moore, 612, S. C.*

Tuesday,  
 20th Nov.

DAVISON v. MURE and others.

Covenant on a charter-party, whereby, if the ship should be lost, burnt, or taken, and it should appear to a court-martial that the master, &c. had made the best defence they could, the freighters covenanted to pay the value of the ship. The holding of a court-martial is a condition precedent.

THIS was an action of covenant on a charter-party, by which the plaintiff had let to freight to the defendants, who were contractors with government for providing transports for stores, a certain vessel. The charter-party contained a clause, that if the ship should be lost, burnt, or taken, and

&c. had made the best defence they could, the freighters covenanted to pay the value of the ship. The holding of a court-martial is a condition precedent.

it should appear to a court-martial that the master, &c. had made the best defence they could, then the defendants covenanted to pay the value of the ship. The declaration stated, that the ship, after taking in stores in *Ireland*, sailed under convoy, and during the voyage was taken by the *Americans*; that the master, &c. made the best defence they could, and so it would have appeared to a court-martial if the defendants had procured one to be held.

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To this declaration the defendants pleaded, 1. That the ship was not taken in a hostile manner; 2. That the master, &c. did not make the best defence; 3. That it would not have appeared to a court-martial that the best defence was made; 4. That it has not appeared to a court-martial that the best defence was made. On the three first pleas issue was joined, and a verdict was found for the plaintiff. To the fourth plea the plaintiff demurred, and the defendants joined in demurrer.

*Davenport*, for the plaintiff, in support of the demurrer. —The sitting of a court-martial is not a condition precedent to the plaintiff's recovery. It was not in his power to procure a court-martial: both the captain and the mariners are prisoners in *America*. A jury can judge as well as a court-martial, and in insurance cases they every day try such questions.

*Wood*, for the defendants, informed the Court that inquiry had been made at the *Admiralty*, and the answer was, that during the last war there were several instances of courts-martial sitting to inquire into losses in the transport service, but that none had occurred during the present war. He was then stopped by the Court.

LORD MANSFIELD.—The charter-party annexes a condition to the payment of the money for the ship in case of capture, &c., viz. that it shall appear to a court-martial that the utmost defence was made. In order, therefore, to obtain the money, the plaintiff must show that the condition has been performed, or that it was by the defendant's fault that it has not been performed. This he has not done. There must therefore be

Judgment for the defendants (a).

(a) See 1 *Saund.* 320 b. 2 *Saund.* 107, b. 352 (\*), 5th ed.

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Tuesday,  
26th Nov.

A man arrested within the verge of the Court is not entitled to be discharged, an arrest in a franchise being only a breach of the privilege of the lord of the franchise.

KIRKPATRICK v. KELLY (a).

**R**ULE to show cause why the defendant should not be discharged out of custody on the ground that he had been illegally arrested. It appeared that a person who had got possession of an abandoned peace-warrant from a man who was in possession of it, took the defendant upon it within the verge of the Court, and carried him before a magistrate, who discharged him; and while the defendant was returning from before the magistrate he was arrested, being out of the verge of the Court, on civil process, at the suit of the plaintiff, by the person who had procured the peace-warrant.

*Wallace, A. G., and Haworth*, showed cause, and *Dunning* was heard in support of the rule.

LORD MANSFIELD.—I take it to be a settled rule, that where a man indirectly, and by trick, does that which it would have been illegal for him to have done directly, he shall be considered as having done it directly. The question, therefore, comes to this, whether if this arrest had been made directly within the verge of the Court, it would have been illegal, so as to have entitled the defendant to be discharged. As at present advised, I think, that though the arrest is illegal as respects a third person, viz. the owner of the franchise, yet that it is not so as it respects the person arrested, nor can he maintain an action for false imprisonment. It is different from the case of breaking open a house under a peace-warrant, and then arresting a party, because that is prohibited by positive law. The Court will not interfere in a summary way unless compelled to do so by authorities, especially in a case where the merits seem to be against the defendant.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—I am of the same opinion. An arrest by breaking open the door of a house is void, because it is against positive law; but an arrest in a franchise is only a breach of the privilege.

Rule discharged (b).

(a) *S. C. cited 3 T. R. 740. v. Wilkes, B. R., E. 1 Geo. 4,*

(b) See *R. v. Stobbs, B. R., 3 B. & A. 502; 1 Chitty Rep. T. 30 G. 3, 3 T. R. 735; 375 (n); Tidd's Pr. 217, 8th Sparks v. Spink, C. B., H. 57 ed. Geo. 3, 7 Tawnt. 311; Piggott*

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HODGKINSON v. FLETCHER and others.

Thursday,  
22d Nov.


**T**RESPASS for breaking and entering the plaintiff's closes and digging coals.—Plea, that those closes, 10 *Jac.* 1., were part of the fee-farms of the Crown; that one *B.* was seised of all the mines, &c. under the fee-farm lands of the Crown, in *Ripley*, who granted them to *A. B.*, and so deduces a title to one *Hunter*, under whom the defendants claim, and justify digging for coals, &c.—Replication, that no right of entry accrued to *Hunter*, or those under whom the defendants claim, within twenty years before the trespass committed.—Rejoinder, that a right did accrue within twenty years before the trespass committed.

On the trial, at *Derby*, before *GOULD, J.*, the evidence was, that the defendants, or those under whom they claimed, had regularly, from the time of the grant to this time, dug for coals under other of the fee-farm lands in *Ripley*; in some quietly, in others with a contest, in which they succeeded; but no positive evidence was given of their having ever worked under the fee-farm lands of the plaintiff till the time when, &c.; but it appeared that neither the plaintiff nor his predecessors had ever dug under the lands. A verdict was found for the defendants, and a rule having been obtained to show cause why there should not be a new trial, the Court called upon the counsel for the plaintiff to support the rule.

*Hill, Serjeant, Wilson, and Wood*, in support of the rule.—The question is, whether the defendants' right to dig in the plaintiff's land is not barred by their not having exercised it for twenty years. The proof of the issue lay upon the defendants, being in the affirmative, and they did not prove any exercise of the right within that period. A right to enter for the purpose of digging for coals or minerals is as much subject to the operation of the statutes of limitation as a right to enter upon the soil. *Rich, dem. Lord Cullen, v. Johnson (a)*. It is necessary, in order to keep up such a right, to do some act, as of working the mine once in twenty years. Suppose that *Hunter* had been the lessor of the plaintiff in ejectment, or demandant in a real action for these

Trespass for breaking and entering close and digging coals. Plea, that close was part of fee-farm lands of *R.*, that, 10 *Jac.* 1., the mines under those lands were granted, &c. and derives title under the grant, and justifies. Replication, that no right of entry accrued within twenty years of the trespass. Issue thereon. Evidence that the grantees had dug, within twenty years, under other fee-farm lands in *R.*; but no evidence of digging under the plaintiff's. Evidence, also, that plaintiff, or his predecessors, had not dug. Held, that the defendants were not barred.

(a) *B. R., M.* 14 G. 2, 2 *Str.* 1142.

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mines, he must have shown a right of entry within twenty years, or a seisin within the proper period of limitation: so, to support this plea, a possessory title must be established. It does not resemble the case where the owner of the soil is likewise the owner of the mines under the soil. *Lead Company v. Richardson* (b).

The answer attempted to be given will be, that the defendants have exercised the right in other parts of the fee-farm lands; but the digging in the lands of other persons can be no evidence against the plaintiff. *Primâ facie*, the owner of the land is owner of the mines also, which pass by a grant of the land. *Co. Litt.* 4. To rebut this presumption stronger evidence is required than was given in this case. If that evidence be sufficient, a man would have nothing to do but to have large words inserted in his grant, and then to dig in parts where he had a right; this would then be evidence against other owners, and evidence which they could never repel.

There is also another objection. The plea, in setting out the grant, makes use of the words, "mines, delfs, and pits of coal," which extend only to such mines as are open, and give no liberty of opening fresh mines. *Astry v. Ballard* (c). In such grants, in order to authorise the opening of fresh mines, the word "digging" is usually inserted. [*Per Cur.* In *Astry v. Ballard*, were not the mines open? They were. *Per Cur.* That, then, is a different case; for here the defendants are entitled to the mines, whether opened or unopened.]

Lord MANSFIELD (without hearing the other side).—It appeared that in 10 *Jac.* 1. there was a grant of the right of mines under the fee-farm lands in *Ripley*. The plaintiff's lands are part of those fee-farm lands, and he pays a proportion of a fee-farm rent. The defendants claim as coal-masters under the original grantee. The plaintiff has put the whole question upon this issue, that whatever may have been the original right, it is now barred by the statute of limitations. I agree with the counsel for the plaintiff, that if the defendants would be barred in an ejectment, they would be barred on this issue upon these pleadings.

It was proved that the defendants have regularly, from

(b) *B. R., M. 3 Geo. 3, 3 Burr.* 1341.

(c) *B. R., H. 28 & 29 Car. 2, 2 Mod.* 193.

the time of the grant up to this time, dug under the other fee-farm lands in *Ripley*, in some quietly, in others with a contest, in which they succeeded; but no positive evidence is given that they ever worked under the plaintiff's lands till the cause of action (*d*). It appeared also that the plaintiff, or his predecessors, had never dug under his lands. These were all the facts proved.

Independently of the law of limitations, there arises a presumption of right in favour of possession, where that possession is adverse to the right claimed. Even in the case of the Crown there is such a presumption in favour of possession. But, to support an argument of this nature, the possession must be notoriously adverse to the claim set up; it must not be a possession consistent with the claim. Thus, the possession of a lessee, of a joint tenant, or of a tenant in common, shall not bar, because it is consistent with the claimant's title (*e*); so, a fine levied by a tenant for life does not begin to run till the particular estate has expired (*f*).

Here, the grantees have never abandoned their right; but, on the contrary, have been continually exercising it. They are not bound to be constantly working in every place. It is the nature of the right to be exercised by degrees, and to go on for ages. The grantees must be governed in the exercise of the right by the circumstances which occur, by the course of the veins, &c. It is a material fact, that neither the plaintiff nor his predecessors have ever exercised the right themselves. Had the mines been worked by them, the case would have been different. But his possession of the land is not a possession adverse to, or inconsistent with, the claim of the defendants, who have had a notorious possession, under the lease, by working the other pits.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—The rule, as to adverse possession, laid down by my Lord, may be found in the case of *Reading v. Royston* (*g*). The *prima facie* evidence of title to the

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(*d*) See *Stanley v. White*, B. R., M. 15 G. 3, *Cowper*, 218; R., 14 East, 332; *Tyrwhitt v. Wynne*, B. R., E. 59 G. 3, 2 B. & A. 554; *Hollis v. Goldfinch*, B. R., H. 3 & 4 G. 4, 2 Dowl. & Ry. 316; S. C. 1 B. & C. 205; *Rowe v. Brenton*, B. R., M. 9 G. 4, 8 B. & C. 758.

(*e*) See *Fisher v. Prosser*, B.

R., M. 15 G. 3, *Cowper*, 218; *Fairclaim*, dem. *Empson*, v. *Shackleton*, B. R., E. 10 G. 3, 2 W. Blackst. 690.

(*f*) *Fermor's case*, B. R., H. 41 Eliz., 3 Rep. 78 b.

(*g*) B. R., H. 1 Anne, *Salk*. 423.

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mines, which the possession of the land affords, is in this case rebutted by the grant. Since the grant, the mines have never gone with the land. Even if none of the pits in *Ripley* had been worked for upwards of twenty years, I do not think that the defendants would have been barred; for, in order to bar them, there must be an adverse possession in some one else, of which no evidence was given. [*The Attorney-general* said, that in *Northumberland* it was usual for the coal-masters to buy up old grants, which had never been used for 100 years, for the sole purpose of preventing their being worked, which had always been the object of the successive proprietors.]

Rule discharged.

Saturday,  
 24th Nov.

REX *against* FISHER, and REX *against* TOWILL.

(*Reported, Caldecott, 185.*)

Saturday,  
 24th Nov.

REX *against* INHABITANTS OF NORTH CURRY

(*Reported, Caldecott, 187.*)

Monday,  
 26th Nov.

GALLANT and Another *against* BOUTEFLOWER.

Counts on promises to a testator may be joined with counts on promises to the executor, and in answer to a set-off the executor may give in evidence money paid by him as executor.

THIS was an action by an executor against an attorney who had recovered a sum of money due to the testator, in an action brought by the plaintiff, as executor, with costs. The declaration in the present action contained four counts: 1. A count for money had and received by the defendant to the use of the testator; 2. A count on an account stated with the testator; 3. A count for money had and received by the defendant to the use of the plaintiffs, as executors; and, 4. A count on an account stated with the plaintiffs as executors. The defendant gave in evidence a set-off, which exceeded the amount of the debt and costs recovered in the former action. This set-off was answered by evidence of two small sums of money advanced, at different times, by

the plaintiffs to the defendant, which turned the balance in favour of the plaintiffs against the defendant. It was objected, at the trial, that these sums were not paid by the plaintiffs as executors, and could not therefore be given in evidence, under a declaration, by the plaintiffs as executors. A verdict was found for the plaintiffs, with leave for the defendant to move to set it aside and enter a nonsuit.

*Wallace*, A. G., and *Rous*, showed cause, and cited *Hookin v. Quilter* (a), and *Smith v. Norfolk* (b).

*Dunning*, *contra*, cited *Eddowes v. Hopkins* (c).

LORD MANSFIELD.—The objection was, that by declaring as executor, the plaintiff would avoid a set-off and costs. The answer is, that if, in fact, he is suing in his own right, he would not be excused from costs (d), nor protected from a set-off. It struck me, that in the present case the declaration must be right, because it was according to the truth of the case. The defendant was employed to recover a debt with costs. That suit was brought by the plaintiffs as executors, and the money they advanced was money advanced in that character. I am now stronger in that opinion. The case in *Strange* was on a judgment by default. I think that here a general verdict on all the counts would be good.

ASHURST, *Justice*.—An executor, by naming himself as such when he need not, shall not be thereby excused from costs. The exemption is on the ground that he is not perfectly acquainted with the testator's transactions (e), but a transaction in his own time he must know. I am not acquainted with any case where, if the money to be recovered will be assets, the parties may not declare as executors. In some cases a man must declare as executor, in others he may or may not, at his election. Whether he will be liable to costs or not, is a question which has often been agitated, but I never heard of an objection like this to the form of the action.

BULLER, *Justice*.—Where the cause of action accrues in

(a) *B. R.*, T. 21 G. 2, 2 *Str.* 358; *Tattersall v. Groote*, C. 1271; 1 *Wils.* 171, S. C. B., T. 40 G. 3, 2 *Bos. & Pul.*

(b) *B. R.*, M. 1 *Car.* 1, *Cro.* 256; *Jones v. Jones*, C. B., E. 4 G. 4, 1 *Bingh.* 249.

(c) *B. R.*, E. 20 G. 3, *ante*, (e) *Accord. per LAWRENCE*, J., *Cowell v. Watts*, B. R., E. vol. i. p. 376.

(d) *Accord. Bolland v. Spencer*, B. R., T. 37 G. 3, 7 *T. R.* 45 G. 3, 6 *East*, 412.

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the lifetime of the testator, the executor must sue as such; where it accrues after his death, the executor may sue as such, or not; and in these cases the Court will not excuse him from costs. Where the sum recovered will be assets, I think he may always declare as executor. It never was an objection that there were counts on promises to the testator, and counts on promises to the executor, in the same declaration (*f*). The two smaller sums which were given in evidence in answer to the set-off, were demandable by the plaintiffs as executors.

Rule discharged.

(*f*) The general rule, now well established, is, that where the money to be recovered would be assets, the counts may be joined. See *Ord v. Fenwick*, *B. R.*, *M.* 43 G. 3, 3 *East*, 104; *Partridge v. Court Exch.*, *H.* 58 G. 3, 5 *Price*, 412; 7 *Price*, 591, *S. C.*; *Clark v. Hougham*, *B. R.*, *T.* 4 G. 4, 3 *Dowl. & Ry.* 322; *S. C.* 2 *B. & C.* 149; 2 *Saund.* 117 *d* (*n.*), 5th ed. As to the rule in case of executors defendants, see *Ashby v. Ashby*, *B. R.*, *M.* 8 G. 4, 1 *Man. & Ry.* 180; *S. C.* 7 *B. & C.* 444.

Wednesday,  
28th Nov.

The KING v. TEMPERANCE GREEN, otherwise SHREIBER, and Others.

The Court will grant a rule nisi for an information for a conspiracy in taking away from his father's house a young man of fortune under age, for the purpose of marrying him to one of the conspirators, though the young man is not heir-apparent to his father.

**MORGAN** moved for a rule to show cause why an information should not be filed against Mrs. *Temperance Green*, otherwise *Shreiber*, Mrs. *Wildman*, *Jane Barchas*, *Robert Atkyns*, *Mary Thomasin*, and the Reverend Mr. *Stevens*, for a conspiracy, since carried into execution, to take away from his father's house young Mr. *Shreiber*, an infant of the age of seventeen years, who was entitled to a large fortune when he came of age, and to marry him, in *Scotland*, to a Mrs. *Green* (one of the defendants), a widow, of small fortune, of the age of thirty-five. The motion was made at the instance of Mr. *Shreiber*, the father of the young man.

The Court, when it was first moved, made some difficulty in granting the rule to show cause, owing to its not being the eldest son and heir that was taken away; and directed the motion to stand over till the cases had been looked into, where either informations had been granted, or indictments had

been held to lie, for taking away a child who was not an heir.

Some days afterwards, Lord MANSFIELD said, that they had looked into the cases, which were many, both old and modern, and that they had no difficulty in granting the rule to show cause, and he particularly directed *Morgan* to look into the case of *the King against Lord Ossulston and Others (a)*.

The matter was however soon afterwards made up between Mr. *Shreiber* and his son and daughter, and never came again before the Court.

Lord MANSFIELD, in this case, directed a search to be made in the Crown Office for informations on this subject, in consequence of which the following list was obtained. Only one of the informations was framed on the statute 4 & 5 P. & M. c. 8.

*Trinity, 14 & 15 Geo. 2. Somersetshire. Rex v. Francis Molloy.* Information granted against the defendant for taking away *Mary Norman*, a virgin, and unmarried, between seventeen and eighteen years of age. That *A. B.*, *C. D.*, *E. F.*, and *G. H.* had, by lawful means, the order and governance of one *Mary Norman*, the daughter of *J. Norman*, and by consent of *J. Norman* placed her under the care of one *J. Staggs*, a schoolmaster, to be educated; that she was entitled to a considerable fortune of £3000 and upwards, personal estate; that defendants, in the night-time, unlawfully entered the house of the said *J. Staggs*, and carried her away with intent to marry her.

*Hilary, 15 Geo. 2, 1741. Kent. Rex v. Cornforth and Others (b).* Information granted against the defendants for a conspiracy in taking away one *Mary Boone*, spinster, then a maid, and unmarried, and under sixteen years of age, an illegitimate daughter of *T. Boone*, with intent to marry her.

*London.* Another information against the same *Cornforth* for procuring a licence to marry by a false oath.

*Easter, 4 Jac. 2. Rex v. Atkyns and Others.* Information against the defendants for forcing a man *non compos mentis* out of the custody of his guardian, and to marry one of the defendants.

*Hilary, 7 Geo. 3, 1767. Middlesex. Rex v. Charles*

(a) *B. R., H. 12 G. 3, 2 Str.*  
1107.

(b) *B. R., H. 15 G. 2, 2 Str.*  
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*Sweet.* Information granted for seducing and taking away *Mary Sampey*, only child and heir-apparent of *John Sampey*, of the age of fourteen years, and marrying her in *Guernsey*.

*Hilary*, 12 Geo. 2. *Sussex. Rex v. Lord Ossulston and Others (c).* Information granted for running away with *Mary Eades*, a virgin, under sixteen years of age, ward to her uncle, *T. W. Brereton*, Esq., and entitled to a fortune of £8000, and marrying her, 10th December, 11 Geo. 2, to *Charles Pearson*, one of the conspirators. 1st count on the statute, the rest at common law.

*Michaelmas*, 24 Car. 2. *Rex v. Storey and Others (d).* Information by the coroner and attorney for a riot with intent to take away a virgin without the consent of her mother, *Mary Gilborne*. Trial at bar, *M. 24 Car. 2. Storey* fined £100, and to find security for his good behaviour for five years. The rest convicted and punished.

*Michaelmas*, 20 Car. 2. *Rex v. Twisleton and Others (e).*

*Trinity*, 14 & 15 Geo. 2. *Rex v. Heary and Others.* The defendants were convicted on an indictment for a conspiracy in carrying away one *Henrietta Arnold*, aged thirteen, with £3000 fortune.

*Trinity*, 1 Anne. *Regina v. Blachel and Others (f).*

*Trinity*, 42 Eliz. *Basham v. Dennis (g).*

WILLES, *Justice*, mentioned the cases of *Eyre v. Shaftesbury (h)*, and *Goodall v. Harris (i)*; and *ASHURST, J.*, the case of *R. v. Freeman, M. S.*, in which *Gould, J.*, was counsel, when a rule to show cause was granted, but nothing further was done (*k*).

(c) *B. R.*, *H. 12 G. 2*, 2 *Str.* 1107.

(d) *B. R.*, *M. 24 Car. 2*, 3 *Keble.* 101.

(e) 1 *Lev.* 257; 1 *Sid.* 387, *S. C.*

(f) 7 *Mod.* 39.

(g) *Cro. Eliz.* 770.

(h) 2 *P. Wms.* 102.

(i) *Id.* 562.

(k) See statute 9 G. 4, c. 31, s. 19, and the printed report of *Wakefield's case*, 1827; *R. v. Ward, B. R.*, *M. 3 G. 3*, 1 *Blackst.* 386; *R. v. Clarke, B. R.*, *T. 31 G. 2*, 1 *Burr.* 606. As to conspiracies, to marry paupers, see *Russel on Crimes*, vol. ii. p. 566, 2d ed.

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HARTLEY v. BUGGIN (a).

THIS was an action on a policy of insurance upon the ship *Blossom*, at and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and slaves. The cause was tried at the last assizes at *Lancaster*, before HEATH, J., and a verdict was found for the plaintiff, with which the learned judge reported himself satisfied.

On a rule obtained to show cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but the question now raised was, whether the plaintiff, by the use he made of the ship on the coast of *Africa*, and the delay he there occasioned, was not the cause of the loss; that is, whether he did not make such use of her, during her stay on the coast, as amounted to a deviation. It appeared in evidence that this ship staid on the coast from *August* to *March*; that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships and sent to the *West Indies*; that this is the employment of what they call a *factory ship*, but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in other vessels; but it did not appear that any slaves, the produce of the *Blossom*'s own cargo, were sent away in other vessels. It appeared, however, that her stay there was seven months beyond the usual stay of ships in that trade.

*Wallace*, A. G., *Lee*, *Davenport*, and *Wood*, showed cause against the rule for a new trial. They contended that this use of the ship as a factory ship was not inconsistent with the object of the voyage. If the ship does nothing which increases her risk and prolongs her stay, or is inconsistent with the object of her voyage, it is not a deviation. Here she parted with no slave, the produce of her own cargo, which ever was on board of her. Ships can only be supplied in turn, and whilst she is forced to wait there, she may as well receive the slaves of the other ships as not. It is the course of the trade so to do. The definition of a factory ship

Insurance on ship at and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and slaves. The ship staid at the coast of *Africa* several months, and was employed as a receiving ship for slaves, afterwards put on board other ships, which was the employment of a *factory ship*. Held that this was a deviation.

(a) *S. C. Park, Ins.* 415; but without the arguments of counsel.

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is a floating warehouse, not her merely being thatched and covered.

*Arden and Dunning, contra*, in support of the rule, were stopped by the Court.

LORD MANSFIELD.—When different points are agitated at a trial, and a great deal of evidence is applied to each, and the counsel go out of a cause, it is not surprising that juries should have their attention distracted from the principal point. The great advantage of a motion for a new trial is, that after argument on the motion, the cause goes down again winnowed from the chaff of the first trial. The single question in this case is, whether there has not been what is equivalent to a deviation. It is not material, to constitute a deviation, that the risk should be increased. The voyage is to the coast of *Africa*, and thence to the *West Indies*, which includes an insurance on the ship while she stays and trades at *Africa*, and it is with liberty to exchange goods and slaves; but that exchange is for the benefit of the ship, one slave for another. If a ship insured for a trade is turned into a factory ship, or a floating warehouse, the risk is different; it varies the stay, for while she is used as a warehouse no cargo is bought for her.

The law being clear, how is the fact? The captain says the vessel was not used as a factory ship; but his evidence is much impeached. Indeed, he says that he was young in the trade, that he never saw a factory ship but once, and was not in her. He might have a salvo, because this vessel was not thatched, as factory ships usually are; but the question is, was she used as a factory ship? Without being thatched and roofed, she may have been put to that use. The fact is clear: the risk is different, and there must be a new trial.

Rule absolute (b).

This cause was again tried at the *Lancaster* Summer Assizes, 1782, before EYRE, B., and evidence was given that, since the establishment of agencies on the coast, it had been a custom with the plaintiff's ships to stay till others came, and that it was intended to go to the *West Indies* just before the accident happened; that the putting the vessel

(b) That a voluntary delay 26; *Williams v. Shee*, 1813, will operate as a deviation, see: *coram* *Ld. Ellenborough*, 3 *Smith v. Lurridge*, 1801, *coram* *Campb.* 469. *Ld. Kenyon*. 4 *Esp. N. P. C.*

ashore was to prepare her for the voyage; that by agencies the sailing of ships was much expedited; and that she had not staid an extraordinary time. EYRE, B., told the jury that there was no question of fact; that it was clear the ship was employed as a *factory*. What the effect of that was afforded great room for argument. One side contended that it was usual and allowable in the course of trade; the other side, that it varied the risk materially. New modes of trade were advantageous, and it was not for the interests of commerce to be cramped by underwriters. An assured was to conduct his trade his own way, with this exception, that it does not materially vary the risk insured. Barter, for the facilitation of the voyage, was allowable without express stipulation. The question was, if the use made of the ship had the voyage for its object. The jury found a verdict for the defendant.

1781.

HARTLEY  
v.  
BUGGIN.

SHIRLEY v. WILKINSON (a).

THIS was an action on a policy of insurance. A verdict having been found for the plaintiff, a rule to show cause why there should not be a new trial was obtained on the ground that the verdict was against evidence, there having been a material concealment. It appeared in evidence, that *Davis* and *Protheroe*, the agents who had directed the insurance to be made on the part of the plaintiff, had received a letter, dated 23d of *July*, from the captain of the vessel insured, on the 28th of *October*, in which he said, "I have now eighty hogsheads on board, one half ballast in, and I expect to be ready for sea very early in *August*." Another letter was also received by them from the captain, in which he said, giving directions for the insurance, "which sails from *Morant Bay* in all *August*;" and another letter of the 27th *July*, in which he said, "Not being able to get ready to sail with this fleet, she is to go in *August*, and run it." *Protheroe* was examined as a witness at the trial, and said, "I gave orders to insure. I did not send intelligence of the captain's letters, because, from other letters, I thought he could not sail as soon as he expected." The fleet from *Jamaica* to *England* usually sails by the 1st of *August*, and it is ma-

The concealment of letters, stating that the vessel is about to sail early the next month, is a material concealment, and avoids the policy.

(a) Note of *S. C. ante*, vol. i. p. 306 (n).

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SKIRLEY

v.

WILKINSON.

terial whether a ship sails before or after that time. The jury thinking the letters not material found a verdict for the plaintiff.

*Wallace, A. G., Dunning, and Wilson*, now showed cause. These letters contained nothing material; they were merely the captain's opinion, which *Protheroe*, from the circumstances, thought not well founded. In truth, nothing was kept from the underwriters but what would have lessened the risk rather than have increased it.

*Lee and Howorth, contra.*—The question is not, how *Protheroe* understood the matter, but whether he ought not to have laid every thing he knew on the subject before the underwriters, and have enabled them to form their own judgment on it. In all cases of insurance, an underwriter has a right to have all the information laid before him that the insurer himself possesses.

Lord MANSFIELD.—I certainly thought, on the trial, that this matter was material to be communicated to the underwriters. The premium depended on the time the ship sailed. If she sailed at a particular time she was a missing ship, otherwise not. The broker is asked by the underwriters, what is his intelligence? He only says, "She does not come with the fleet." What intelligence had he? The letters of the captain. Of these letters nothing was communicated but that the ship did not sail with the fleet, which sails on the 1st of *August*. The material point was, that she would be ready for sea very early in *August*. I think this letter of the captain's very material, and that it should have been communicated.

The rest of the Court being of the same opinion,

Rule discharged (b).

(b) This case appears to be at variance with those of *Fort v. Lee*, C. B., H. 51 G. 3, 3 Taunt. 381; and *Forley v. Moline*, C. B., E. 54 G. 3, 5 Taunt. 430; 1 Marsh. 117, S. C. See also *Court v. Martineau*, M. 23 G. 3, post, and the note there. In *Bridges v. Hunter*, B. R., H. 53 G. 3, 1 M. & S. 19, LE BLANC, J., says, "I believe it has always been considered that the time of the ship's sailing, if known to the assured, is a ma-

terial fact to be communicated to the underwriter." See also *Willes v. Glover*, C. B., E. 44 G. 3, 1 Bos. & Pul. N. R. 14; *Kirby v. Smith*, B. R., T. 58 G. 3, 1 B. & A. 672; *M'Andrew v. Bell*, 1795, coram *Ld. Kenyon*, 1 Esp. N. P. C. 373; *Webster v. Foster*, 1795, coram *Ld. Kenyon*, 1 Esp. N. P. C. 407; *Lütledale v. Dixon*, C. B., H. 45 G. 3, 1 Bos. & Pul. N. R. 151.

1781.

Lord PAGET v. MILLES.

**T**RESPASS for fishing in the separate fishery of the plaintiff. After verdict for the plaintiff, a rule to show cause why there should not be a new trial was obtained, and the only question made was on the construction of a grant from the plaintiff to the defendant, whether it operated as a grant of the fishery, reserving to the grantor only a right of fishery; or whether it excepted the sole fishery out of the grant. By the deed, Lord *Paget* granted "the mill, with all waters, streams, &c. necessary for working the mill, and usually held and enjoyed therewith, *except and always reserved to the said Lord Paget, his heirs, &c., the right and privilege of fishing in the waters of the said mill.*" At the time of this grant, Lord *Paget* had a sole fishery in these waters.

*Dunning* and *Davenport* showed cause.—This is not a reservation of a right of fishing, but an exception of the right of fishing, which Lord *Paget* possessed before, and which was a sole right. It is an exception of what the grantor had before, and did not choose to part with. By the grant, every thing necessary to the mill for driving and working it was granted, as well as for confining the water; but the words of the grant, had they stood alone, would not have carried the right of fishery. The exception, however, puts an end to all question.


*Wallace, A. G., and Law, contra.*—The words of the grant are sufficient to convey the soil of the water and of the ponds, and therefore it is clear that, without the reservation, Lord *Paget* could have had no title. Where a grant is made, all that the granting words used include, will pass by the grant (a). By the reservation, nothing more than the easement of fishing in the waters is reserved. The words of the reservation are the words of the grantor, and shall be taken most strongly against him. *Co. Litt.* 197, *Plowd.* 171, 1 *Saund.* 137. Those words will be fully satisfied by holding that an easement is reserved.

Lord MANSFIELD.—If there are words in the English language which will not admit of a doubt, they are these

(a) *Throckmerton v. Tracy, C. B., 2 & 3 P & M., Plowden, 151.*

*A. being seized of a mill, and having a sole fishery in the waters of the mill, granted the mill, with all waters, streams, &c. necessary in working the same, "except, and always reserving, the right and privilege of fishing in the waters of the said mill." Held, that this was an exception of the sole fishery, and not a reservation of a new easement.*



1781. words. Lord *Paget* had water for a mill, and he had a sole fishery, and he grants the mill, with the water for the mill,  reserving the fishery ; and the question is, whether the whole right of fishing is reserved, or whether a new right is created by it? The words are, "*the* right and privilege of fishing." Rule discharged.

LORD PAGET  
v.  
MILLS.

**C A S E S**  
**ARGUED AND DETERMINED**  
 IN THE  
**COURT OF KING'S BENCH,**  
 IN  
**HILARY TERM,**  
 IN THE  
**TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.**

**THE KING v. INHABITANTS OF THE HOLY TRINITY IN  
 WAREHAM.**

(*Reported, Caldecott, 141.*)

1782.

Saturday,  
 26th January.

**WALPOLE v. ALEXANDER (a).**

Friday,  
 1st February.

**T**HE defendant obtained a rule to show cause why he should not be discharged out of custody on filing common bail. The application was made on three grounds; 1. That he had come from *France* as a witness in a cause of *Simond v. Hankey*, to be tried at the sittings; 2. That he had been discharged by a commission of bankrupt subsequent to the debt for which he was arrested; and 3. That a suit was depending in *France* respecting the same subject matter.

A witness coming from abroad to give evidence in a cause here, without being served with a subpoena, is privileged from arrest.

The *Attorney-General* and *Cowper* showed cause. As to the privilege of the defendant as a witness, it appears that he arrived in *London* on the 20th of *December*, 1781. On the seventeenth of that month the cause in which he was

(a) *S. C. cited Tidd's Pr. 198. 8th edit.*

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WALPOLE

v.

ALEXAN-  
DER.

to be a witness was put off, in consequence of a letter received from him, stating that he could not attend until after the next term. He swears in his affidavit, that on coming to town he was served with a *subpœna*, by his own desire, which was on the 20th of *December*, the last day of the sittings. Whether the *subpœna* was for the sittings after the last or the next term, does not appear on the affidavit; but as no *subpœna* issued after the 12th of *December*, it must have been for the last term, when, by consent, the cause was postponed. He was arrested on the 28th of *December*, at which time there was no process by which he could be compelled to attend as a witness. The protection afforded to witnesses is not on their own account, but for the purposes of justice; and when the defendant found that the cause could not come on at those sittings, and that it was unsafe for him to remain, he might have returned. It is stated in the affidavit, that an application was intended to be made for permission to examine him upon interrogatories; but that allegation is insufficient, for the consent of both parties is necessary to that proceeding, and it does not appear that it could have been obtained. [The court giving no opinion on the two latter grounds of the application, the arguments of counsel on those heads are admitted.]

Lord MANSFIELD (stopping *Dunning*, who was for the rule). This is the first case of a witness coming from abroad who has required the protection of the court. That protection is extended to witnesses coming from abroad, as well as to those who are resident in this country. Although in *England* a party may have the benefit of the evidence of a witness who has been arrested, by means of a *habeas corpus ad testificandum*, yet, in order to encourage witnesses to come forward voluntarily, they are privileged from arrest. This privilege protects them in coming, in staying, and in returning, provided they act *bonâ fide*, and without delay, which is a question of reasonableness. Every reason which applies to the protection of a witness at home, holds more strongly with regard to a witness who comes from abroad. The creditor is not injured by his coming; for unless he came, there would be no opportunity of arresting him. The service of the *subpœna* abroad would be an useless form; he cannot be punished for not coming; if he comes at all, then it must be voluntarily. The cause depending on the

evidence of a witness who is out of the country, the time of trial must necessarily be uncertain. The only question then to be considered is, whether, in such case, the witness comes *bonâ fide* or collusively.

There never was a fairer case than the present. The parties would not consent to examine the witness upon interrogatories, or to put off the trial; an application was therefore made to me, upon affidavits and letters from the witness. I proposed, and it was so settled, that at all events the cause should go on after this term, whether the witness came or not. In the mean time he arrived, before the sittings were over; but I do not wonder that the parties did not apply to bring on the cause, for it was near Christmas. It is admitted that he was protected for *some* time;—why not until the next sittings? Was he to go back again to *Paris*, merely to return here this term, putting the parties to an enormous expense? I am of opinion, that all the rules which apply to the protection of witnesses here, hold with regard to witnesses coming from abroad, and that the defendant must be discharged.

ASHURST and WILLES, *Justices*, of the same opinion.

BULLER, *Justice*.—It is not true that the privilege of a witness depends upon the *subpœna*. I have found a case (*E. 27. Car. 2.*) where a man was discharged who came to *London* to make an affidavit which might have been made in the country; but it was for the furtherance of justice, and he was therefore protected. No *subpœna* is necessary where the witness lives abroad.

Rule absolute.

The discharge, being on the privilege, was without the terms of filing common bail.

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WALPOLE

v.

ALEXANDER.

THE KING v. INHABITANTS OF KEEL.

(*Reported, Caldecott, 144.*)

Wednesday,  
6th February.

THE KING v. JAMES RODD.

(*Reported, Caldecott, 147.*)

Wednesday,  
6th February.

1782.

Saturday,  
9th February.

THE KING v. MORGAN.

(Reported, Caldecott, 156).

Saturday,  
9th February.

THE KING v. INHABITANTS OF COVENT GARDEN.

(Reported, Caldecott, 158).

Monday,  
11th February.

DOE, on the demises of W., DUKE OF DEVONSHIRE; W. H., DUKE OF PORTLAND; and DOROTHY, DUCHESS OF PORTLAND, his Wife, v. LORD GEORGE HENRY CAVENDISH (a).

The Countess of Burlington by will devised certain estates to trustees, to the use of W. Lord Cavendish for life; remainder to trustees to preserve, &c.; remainder to the use of one or more of such of the child or children of W. Lord C. for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisions, restrictions, &c. as the said W. Lord C. should, by any deed, &c. or by his last will, &c. direct, limit, or appoint. W. Lord C., by his will, devised the premises to trustees, to the use of his son Richard for life; remainder to trustees to preserve, remainder to trustees for a term, for providing jointures and portions for the wife and children of Richard; remainder to the first and every other son of Richard, in tail male; with remainder to testator's son George for life, and the sons of that son, in tail male; remainder to his eldest son William, in fee. The will contained considerable bequests of personality to all the children. Held, that this was a good execution of the power, and that if not good as to the children of Richard, that the limitation to George took effect.

**EJECTMENT** for a messuage in the parish of *St. James's, Westminster*, tried before Lord MANSFIELD at the sittings in this term, when a verdict was found for the plaintiffs, subject to the opinion of the court on the following case:

The *Countess of Burlington* being seised in fee of the messuage in the declaration mentioned (amongst other estates), made her will, dated the 20th of *February*, 1755, whereby she devised all her manors, messuages, lands, &c. in *Great Britain* and elsewhere, to *Richard Arundel* and *Christopher Denton*, and their heirs; to the use of her son-in-law, *William Lord Cavendish*, commonly called the *Marquis of Hartington*, for life, without impeachment of waste; remainder to the same trustees to preserve contingent remainders. "And from and immediately after the decease of the said *William Lord Cavendish*, to the use and behoof of one or more of such of the child or children of the said *William Lord Cavendish*, by *Charlotte Lady Cavendish*, his late wife, deceased, for such estate and estates, and in such shares and proportions, and under and subject to such

(a) S. C. 4 T. R. 741 (n); but without the arguments of counsel.

*powers, provisoes, conditions, restrictions, or limitations as the said William Lord Cavendish should, by any deed or deeds, writing or writings, to be by him signed and sealed in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, to be by him signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses, nominate, direct, limit, or appoint; and for want of such nomination, direction, limitation, or appointment, to the use and behoof of all and every the child and children of the said William Lord Cavendish, by the said Charlotte Cavendish, his late wife, equally to be divided between them; if more than one, share and share alike, to take severally, as tenants in common, and not as joint tenants; and of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing; and failing issue of any of the said children, then as to the share or shares of him, her, or them so dying without issue, to the use and behoof of all and every such other child or children, equally to be divided between them, if more than one, share and share alike, to take in like manner, as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of such other child and children lawfully issuing; and in case all such children shall die without issue, or that there shall be but one such child then living, to the use and behoof of such one only child, and the heirs of his or her body, lawfully issuing; and for default of such issue, to the use and behoof of the said William Lord Cavendish, his heirs and assigns, for ever." With a power to William Lord Cavendish to make leases in possession for twenty-one years; after which was the following clause: "I give and bequeath all the rest and residue of my personal estate and effects, of what nature or kind soever, unto the said William Lord Cavendish, his executors, administrators, and assigns, in full confidence that, in case there shall remain in his possession any surplus of my personal estate, he will distribute and divide the same amongst his said children at his discretion; and I do hereby nominate and appoint the said William Lord Cavendish sole executor of this my last will and testament."*

The said *Countess of Burlington* died soon after making her said will; and the said *William Lord Cavendish*, afterwards *Duke of Devonshire*, having issue then living, three

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sons, *William*, now *Duke of Devonshire*, *Richard Lord Cavendish*, and *George Lord Cavendish*, and one daughter, *Dorothy*, now the wife of the *Duke of Portland*, by virtue of the said will entered into the possession of the messuage in the declaration mentioned, being part of the premises so devised to him, and continued in such possession to the time of his death.

The said *William, Duke of Devonshire*, deceased, duly made and executed his will, dated 18th of *May*, 1763.

"Also I give and devise unto my brothers, *George Cavendish* and *Frederick Cavendish*, their heirs, executors, &c. all such my real estate and estates in possession, reversion, remainder, or expectancy, as I have power to dispose of, either by the will of *Dorothy*, late *Countess of Burlington*, deceased, or of my own or my late father's purchase, or otherwise howsoever. And likewise all my moneys, securities for money, and money which I have power to raise out of my estate or estates, and all other my personal estate, of which I have not already made, or shall hereafter make, any particular appointment or appointments (except such parts thereof as I shall hereafter bequeath to my eldest son), in trust that they, my said brothers, and the survivor of them, and the heirs, executors, and administrators of such survivor, do thereout pay, apply, and appropriate unto and to the use of my daughter *Dorothy* the sum of £30,000, which I give to her as her portion, or fortune, with interest from the time of my death, after the rate of four per cent. And afterwards, as soon as conveniently may be, to lay out the residue of my said personal estate in one or more purchase or purchases of lands, or tenements of inheritance; and till that can be done, invest the same in real or government securities, and pay and apply the rents and profits of all my said real estate, and the interest and income of all my said personal estate, to and for the benefit of my said two younger sons, *Richard* and *George Cavendish*, in equal shares, until the younger of them shall have attained the age of twenty-one years; and then make an equal partition of my said real and personal estate, if any shall then remain personal, and stand seised thereof, or cause the same to be conveyed or settled (that is to say), as to one divided moiety thereof, to the use of my said son *Richard* for life; remainder [to the same trustees to preserve contingent remainders]; remainder to my brother,

John Cavendish, and the Earl of Besborough, their executors and administrators, for the term of five hundred years, in trust for the purposes hereinafter mentioned; remainder to the first and every other son of my said son Richard successively, in tail male; remainder to my said son George for life; remainder [to the same trustees to preserve contingent remainders]; remainder [to J. C. and Lord Besborough for five hundred years]; remainder to the first and every other son of my said son George successively, in tail male; remainder to my eldest son, William Cavendish, his heirs and assigns, for ever."

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The other moiety was limited to Lord George Cavendish for life, with like remainders over.

The trust of the terms was declared to be for the purpose of providing such jointures to the wives of Lord Richard and Lord George, and such portions to their younger children, as the said four trustees should think reasonable and direct; and that if either of them should die, leaving only a daughter or daughters, for the purpose of raising such portions for such daughter or daughters as the said trustees should think proper and direct, so as no one daughter should have more than £10,000.

The said testator, William, Duke of Devonshire, died, without altering or revoking his said will, leaving issue William, the present Duke of Devonshire, Dorothy, now Duchess of Portland (the lessors of the plaintiffs), Richard Lord Cavendish, and the defendant Lord George Henry Cavendish.

The personal estate of the said William, Duke of Devonshire, amounted to upwards of £20,000, after payment of the said £30,000 given to the Duchess of Portland, which has been paid her; and the real estate, devised to the said Lord Richard and Lord George Henry Cavendish, amounted to upwards of £2000 per annum.

The said Lord Richard Cavendish is lately dead, a bachelor.

The question for the opinion of the Court is, whether the will of the late Duke of Devonshire is a good execution of the power given to him by the will of Lady Burlington, or to any and what extent?

Balguy, for the lessors of the plaintiffs, took three several objections to this execution of the power.

1. That the power in the late Countess of Burlington's



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will entitled the late *Duke* to appoint only to children by his late lady, and not to grandchildren; whereas, in the execution of that power, he has given his own children only life estates, and given the inheritance to his grandchildren, as purchasers.

2. That the jointuring and raising portions for the younger children of his younger sons, *Lord Richard* and *Lord George*, are not within the power, or that, if they are, the execution is bad; such jointures and portions being left to be provided and raised by the discretion of others, and at best being but a power. *Delegatus non potest delegare.*

3. That the ultimate limitation to the present *Duke* is void; and that such residue is undisposed of, and will go equally amongst the present *Duke*, the *Duchess of Portland* and *Lord George Henry Cavendish*; first, because it is but a remainder; and as the power does not use the words "such time and times," the late *Duke* could not give other than immediate interests; secondly, because, it being a limitation after failure of issue male of *Lord Richard* and *Lord George*, though that issue male could not take if the first objection prevailed, yet they would prevent the remainder over to the present *Duke* from taking effect.

If these objections should all prevail, then he contended, that the execution of the power was wholly void; for though he admitted that the execution of a power might be good in part, and bad in part, yet if it would be more agreeable to the scope and tenor of the power that the whole should fall than that part should be supported, the Court would put that construction upon it. If only some of the objections should prevail, he hoped the Court would draw the line, in a family concern, how far the power was well pursued.

He cited, and much relied upon, the case of *Alexander v. Alexander* (b), as going to the whole of the case he had to maintain; and said, that though the expressions used in the two powers were somewhat different, yet that arose from their applying to different subject matters. With that difference, the words were equally large and comprehensive in the one case as in the other. He also cited the cases of the *Attorney-General v. Dr. Berryman* (c), and *Ingram v. Ingram* (d).

(b) *Canc.* 1755, 2 *Ves. sen.* 643.

640. (d) *Canc.* 1740, 2 *Atk.* 89.

(c) *Canc.* 1752, cited 2 *Ves.*

Graham, for the defendant, said he should contend, 1. That *Lady Burlington* might, by law, have given a power as extensive as that exercised by the late *Duke* in his will; and 2. That by the fair and natural construction of her will she had done so.

1. All the children of the late *Duke* were *in esse* at the time of *Lady Burlington*'s death, so that the uses might, by law, be suspended as long as they were, in fact, suspended by the late *Duke*'s will; which could not have been if the late *Duke* had had no children living at her death: according to *Humberston v. Humberston* (e).

2. Powers are of two kinds: first, powers of appointment to uses; and secondly, powers of leasing, committing waste, raising portions, and settling jointures. The latter are out of the question. The former were creatures of equity till the statute annexed the possession to the use. It was decided, that the use need not be executed at the moment the conveyance was executed, but that the operation of the statute will wait till the use arises on a contingency; and so, in the same manner, when the use became fixed or appointed by the execution of a power. Consequently, powers, being transferred by the statute from equity to law, are to be construed as in equity.

A distinction is made between naked powers and powers coupled with an interest, as powers of leasing. The latter are said to be construed liberally, the former strictly. The reason given is, that the former are part of the dominion of the original possessor. But that distinction is not well founded; for the latter are clearly part of the old dominion also, as in the present case. The true rule is, that powers are to be construed according to the instrument in which they are contained. If in a will, they are to be construed liberally. *Beale v. Beale* (f).

The case of *Alexander v. Alexander* is founded on no authority, and no decision resembling it is to be found either before or since. *Thwaites v. Day* (g) is rather against it, for there the limitations were as here; and though no question was made of their validity, it might have arisen; for if the limitation to the first and other sons was void, then the £500 legacy was too remote, as given after an indefinite

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(e) *Canc.* 1716, 1 *P. Wms.* 244.

332. (g) 2 *Vern.* 80.

(f) *Canc.* 1713, 1 *P. Wms.*

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failure of issue of the youngest son. But *Alexander v. Alexander* was a case of personalty. The testator might well be supposed to mean, that the whole should be apportioned amongst his children as a provision for them. Courts of law and equity lean against limitations over of personalty.

The words of this power are of greater latitude. What powers could be meant, but powers of leasing, jointuring, &c., all appendages of estates in strict settlement? What limitations? It is the language of the law to say, that a man holds an estate under limitations in strict settlement.

Sir Thomas Clarke says, that the words "for better advancement in marriage" will authorize an appointment in strict settlement (*h*). Then why will not the words "under and subject to such powers, provisoes, conditions, restrictions, and limitations?"

At all events the appointment is good, so far as it is clearly warranted by the power. Therefore the estates for life, in each moiety to each son, are clearly good; and the cross remainders, instead of being vested (as they would be if the whole appointment were good), are converted into contingent cross remainders, depending on the contingency of either son's dying without issue. Under the general words, the *Duke* could give a contingent interest to any child. Whether the remainder *in fee* to the *Duke* is good or not, it is not necessary to inquire. But that also is within the terms of the power. When the power is to appoint to one or all of the children, the appointment may be either of a present or reversionary interest to any one; for the doctrine, that the share must not be illusory, applies to cases where the appointment must be among all the children.


Though the grandchildren take as purchasers, they take only in consequence of the provision to their parents, and not as primary objects.

The appointment of the trustees of the five hundred years' term is not a delegation of the whole authority; for they are bound to raise the sums. A small discretion only is reposed in them, which is good if warranted by the general meaning of the power.

Balguy, in reply, said, that arguing for a liberal con-

(*h*) 2 *Ves. sen.* 642.

struction as to the objects of the power might possibly be agreeable to late cases, but that it was presuming the very point in debate to extend this power to grandchildren: that the admitting as liberal a construction of the power here, as in a court of equity, was surely as much as could be expected from him; but that it was too much to say in a court of law that courts of equity had been too strict: that as to the case of *Thwaites v. Dye*, the point was not, nor could it be, made there: that there could be no doubt as to whom the power in that case should extend to, which was the very matter now in contention.

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Cur. adv. vult.

LORD MANSFIELD now delivered the judgment of the Court. The question for the opinion of the Court is, Whether the will of the late *Duke of Devonshire* is a good execution of the power to any and what extent? [His lordship then stated the words of the power, and the will of the late *Duke*.] At the opening of the argument, a ground struck me which seemed to be decisive, but the parties had not been aware of it, and the case was not adapted to it. I called for the will of the *Duke of Devonshire*. By that will he leaves great bequests to each of his children. To the *Duke*, furniture, crown leases, &c. to a great value, charged with £20,000. To the younger children, £1000 annuity, and £1000 in cash. There were great provisions made for all his children. At the *Duke's* death his children were all under age; they have since attained their full age, have taken under the will, and have enjoyed their bequests.

The first ground, which seems to be very clear, is, that it is not permitted to any of the parties who take under the *Duke's* will to dispute it. Their mouths are closed. It is a tacit condition annexed to every bequest by will, that the taker is bound, not only not to object, but also to maintain the title of the rest, unless he chooses to give up his own portion; a most reasonable rule, because a man makes a will presuming that the whole of it will stand. What, then, is the case with regard to the will of the *Duke of Devonshire*? The tenants for life, under that will, are tenants in tail under the will of *Lady Burlington*. If they choose to take as tenants in tail, they must renounce all benefit under the *Duke's* will.

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The second ground is this: The lessors of the plaintiffs contend that the execution is void *in toto*. As to that, we are of opinion, that though the limitation to the grandchildren be void, yet the limitation to *Lord George* will be good, so as to prevent the lessors of the plaintiffs from recovering (i).

The third ground, which is the question to which the case is adapted, is, Whether the power is well executed, to any and what extent. As to that, as the parties desire our opinion, we will give it, though it is not necessary.

It is clear that all powers must be executed according to their meaning. It is clear also, that in the case of a power to appoint, amongst several objects, the execution cannot extend beyond those objects. All the cases to be found on this subject have arisen on the question, Who were the objects intended? *Alexander v. Alexander* is no more. *Maddison v. Andrew* (k). But no conclusion can be drawn from hence that *children* can never mean *grandchildren*.

There are three grounds which induce us to consider this a good execution of the power:—1. The subject matter of the power. 2. The limitations for want of appointment. 3. The words made use of in creating the power. First, With regard to the subject matter. This is not money. It is not a provision for children, since they are all provided for. It is a limitation of a family estate. She puts the father in her place, to limit the estate in any way he pleases. If the words “strict settlement” had been used, no dispute would have arisen; but *Lady Burlington* uses words tantamount to those. The English language does not afford stronger words to show that she meant an appointment in strict settlement. *Lord Cavendish* was to appoint “for each estate and estates, and in such shares and proportions, and under and subject to such powers,” &c. She meant by this, such a settlement as the *Duke* would make in his own family.

Partial objections have been made, as that the *Duke of Devonshire* could not take a reversion (l); and *Alexander*

(i) But see *Alexander v. Alexander*, 2 Ves. 640; *Robinson v. Hardcastle*, B. R., H. 28 Geo. 3, 2 T. R. 251; *Sugden on Powers*, 550, 4th edit.

(k) *Canc. 1 Ves. 57; 2 Br.*

C. C. 26 (n). *semble*, S. C. See *Sugd. on Powers*, 510, 4th edit.

(l) See *Sugden on Powers*, 517, 4th edit.

v. *Alexander* was cited; but that was a case of money. Then it is said, that the jointures and portions are at the discretion of others, and that a power cannot be delegated. The maxim is true; but it does not apply. *Lady Burlington* gives the *Duke* absolute power; and, in pursuance of that, he gives the power of jointuring. On all these grounds, we are of opinion against the lessors of the plaintiffs.

Postea to the defendant (m).

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(m) The above decision, so far as it relates to the execution of the power, cannot, as it seems, be now considered law. A similar point arose in *Griffith v. Harrison*, *Canc.* 1791, 3 *Br. C. C.* 410, when a case was directed for the opinion of the Court of *King's Bench*. After argument that Court was divided in opinion. Lord KENYON and Mr. Justice GROSE certifying, that the power must be exhausted upon the children; and Mr. Justice ASHURST and Mr. Justice BULLER holding in conformity with, and on the authority of, the principal case, that the word "children" might include "grandchildren," and that the will of the testator required that construction. *Griffith v. Harrison*, *B. R.*, *T.* 32 *Geo.* 3, 4 *T. R.* 737. In a subsequent case it was held, both by the Court of *King's Bench* and by Lord ELDON, that a similar power did not authorize a limitation to grandchildren, notwithstanding the power contained the words insisted upon by Lord MANSFIELD in the principal case, "for such estate and estates, and with and under such charges, provisions, conditions, and limitations," &c. *Brudenell v. Elwes*, *B. R.*, *E.* 41 *Geo.* 3, 1 *East*, 442; 7 *Ves. jun.* 382. In *Doe dem. Allan v. Calvert*, *B. R.*, *E.* 42 *Geo.* 3, 2 *East*, 381, on the case of *Doe v. Cavendish*

being cited at the bar, LAWRENCE, J., observed, that it was one that would not rule any other, and that he had heard Lord KENYON express that opinion of it. It appears also to have been doubted both by Lord THURLOW (2 *Br. C. C.* 29.) and by Lord ALVANLEY (4 *Ves. jun.* 684.)

In observing upon the case of *Doe v. Cavendish*, Mr. Sugden, in his *Treatise on Powers*, p. 506, 4th edit., says, "Upon the foregoing decision it need only be remarked, that as to the first ground, it can at most only go in aid of the construction upon the words of the power itself; that the second ground bears against the construction of the Court, as the estate was, in default of appointment, given amongst the children in tail, so that they might acquire the fee, and their issue could only take through them, and not as purchasers; and that in regard to the third ground, the objects were, the child or children, and the general words are merely those which are usually inserted by conveyancers, with a view to the interests to be given to the objects designated, and not with an intent to extend the power by implication to objects not named in it." And again, Mr. Sugden says, (p. 510.) "If the case of *Brudenell v. Elwes* is to be treated as a binding au-

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thority, a power, in the precise words of the *Duke of Devonshire's* case, must now be held to extend to children only. It would be idle to attempt to distinguish the cases. The powers are nearly word for word the same."

WORSLEY, *Bart.* v. BISSET.

The Court will not put off a trial on the ground of the absence of a material witness, when it appears that no application has been made to the witness to know whether he will attend.

IN an action for criminal conversation with the plaintiff's wife, the defendant obtained a rule to show cause why the trial of this cause, which stood for the sittings after this term, should not be put off, on account of the absence of *LORD CHOLMONDELEY*, who was at *Paris*, whom the defendant apprehended to be a material witness, and whom he expected home in the course of a few months. But it not appearing that any application had been made to *LORD CHOLMONDELEY* to know whether he would come over and give evidence, the rule was discharged; *LORD MANSFIELD* saying, that it was by no means of course to put off a trial on such a general affidavit (a).

(a) See *Tidd's Pr.* 831, 8th edit.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE

TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.

HUTTON v. BOLTON (a).

Thursday,
18th April.

THIS was an action against the defendant, a coach-owner, under the following circumstances. The plaintiff had delivered a trunk, which he swore to be of the value of £20, to the defendant, to be carried. The trunk being lost, the defendant offered to pay £20, declaring that he had put an advertisement into the newspapers, signifying that he would not be answerable beyond that sum, unless the parcels should be booked. This he meant to make the ground of his defence; and he had obtained a rule to show cause why he should not be permitted to pay the £20 into court.

In an action against a coach-owner for losing a trunk, the defendant was allowed to pay into court the amount of the sum to which he had, by notice, limited his responsibility.

Erskine showed cause.—When the damages are uncertain, the defendant cannot pay money into court. — v. *Farrell* (b), *Fisher v. Prince* (c). It may be necessary not only to set a value upon the goods, but likewise to estimate the inconvenience which the plaintiff may have sustained. There is also another fact to try in this case, viz. whether there was any notice to the party; for notice to the public only would not be sufficient.

(a) S. C. 1 H. Bl. 299 (a).

(c) B. R., M. 3 G. 3, 3 Burr.

(b) B. R., E. 12 W. 3, 12 1363.

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Baldwin, contra.—The fact of notice must be proved at the trial, otherwise the plaintiff must have a verdict to the full value of the goods lost. The present application is just and reasonable, although it may not be supported by precedent. It would be a great hardship upon the defendant if he should be compelled to pay costs upon a verdict for the £20, which he is now ready to pay. The Court is not called upon to settle any question of damages; the defendant, at the trial, must show that he is only liable for the stipulated damages, which he has paid into court, or the plaintiff must have a verdict.

Lord MANSFIELD.—When I first came into this court there was a difficulty about delivering up goods in an action of trover, because, as it was said, the Court does not keep a warehouse. But I thought that a delivery to the party would do as well. The object is, that unnecessary litigation should be prevented, and that the plaintiff who chooses to proceed for more than is due should not recover costs. Here, according to the defence set up, a specific sum is due, and I do not see why a tender should not be made. If he is liable for more than he has paid into court, no injury is done, for the plaintiff will have a verdict, and the defendant must pay the costs. Upon principle I am inclined to think that the defendant ought to be permitted to pay the money into court.

ASHURST, *Justice.*—The costs should fall on the party who is in the wrong. The facts are equally in the knowledge of both parties. It is a different case from those which have been cited, for the defendant does not litigate the value.

BULLER, *Justice.*—This is a new question. The case in *Burrow* is distinguishable, for there the goods were not lost, but damaged. Upon principle, I see no difficulty. It is said that the plaintiff may recover for the inconvenience he has suffered; but the action is *assumpsit* for not delivering goods, and no special damage is laid. The inconvenience, therefore, cannot be given in evidence. I think that a tender might be pleaded; for, as I have just said, it is merely an action for the value of the goods. The defendant might have set out his whole defence specially, and then pleaded a tender. I can see no objection to such a plea; and, upon the whole, I am of opinion, with my Lord Chief Justice,

that the defendant should be permitted to pay the money into court.

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(d) But where, in *assumpsit* against a carrier to recover the loss sustained by the sinking of the defendant's barge, whereby the plaintiff's goods were spoiled, the defendant applied for leave to pay into court the *invoice price* of the damaged goods, the Court of Common Pleas refused to permit the money to be paid in, observing that the courts had not gone so far as to allow money to be paid in, in cases of uncertain damages; but that, where there was any contract between the parties upon which the Court could rest, it might be done. *Fail v. Pickford*, C. B., T. 40 G. 3, 2 B. & P. 234. This case cannot be considered as overruling the decision in the text, in which there was a con-

tract between the parties upon which the Court could rest, viz. the special contract, that only a sum certain should be paid, unless the terms of the defendant's notice were complied with. Although, in one case, it was held that the payment into court of the sum to which the carrier had restricted his liability, was such an admission of the contract stated in the declaration, as to preclude the defendant from giving his notice in evidence; *Yates v. Willan*, B. R., M. 42 G. 3, 2 East, 128; yet the authority of that decision has been shaken, if not destroyed, by the opinion of the Court in the subsequent case of *Clarke v. Gray*, B. R., T. 45 G. 3, 6 East, 564.

MASON v. SAINSBURY and Another (a).

Friday,
19th April.

THIS was an action, on the riot act, to recover damages sustained by the demolition of a house in the riots of 1780. There was a verdict for the plaintiff, with £259 damages, subject to the opinion of the Court, on a case which stated that the plaintiff had insured the house in the *Hand-in-Hand* fire-office, which had paid the loss; and that this action was brought in the plaintiff's name, and with his consent, for the benefit of the insurance-office. The case was argued, in Hilary Term, by *Mingay* for the plaintiff, and by *Davenport* for the defendants.

Where insurers have paid the amount of the loss occasioned by the demolition of a house by rioters, they may maintain an action in the name of the assured, against the Hundred, under the statute 1 G. 1, c. 5. s. 6.

For the plaintiff it was contended, that there were a variety of cases like the present, in which an action might be maintained in the name of the person originally interested,

(a) S.C.; but without the arguments of counsel. *Marshall*

on *Insurance*, 794, 2d ed.

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although, by a private transaction, the right may be, at the time of suit, vested in another, as in the case of an assignment of a bond: that the premium was paid by the plaintiff, and that the Hundred could make no claim to the benefit of it, for the punishment of whose negligence the act was passed.

For the defendants it was said, that it was impossible that a plaintiff could recover in respect of that for which he had already received a satisfaction. Having two remedies, he has selected that which was most proper. Had he been short insured, he might still recover the deficiency against the Hundred. The persons intended to be protected by the act are the real owners of the property in question. Could a mortgagee bring an action because his security is lessened? An insurer is not a person damnified, because he has an adequate premium. Is he to keep his premium, and yet not to pay the loss? The plaintiff has made his election, not to avail himself of the act of parliament, but to stand upon his own contract.

The Court, considering it to be a case of great importance, directed another argument, which came on in this term.

Wallace, A. G., for the plaintiff.—By a former clause of the statute, the offence is made felony; before the statute, the party injured had his remedy by action of trespass; but, by the act, the inhabitants are put in the place of the trespassers. *William v. Hill* (b). The question then will be, whether the trespassers themselves could have set up this defence? Could they object that the plaintiff has sought another remedy, and that he cannot have a double satisfaction? Whether the insurance be considered as an indemnity, or as a wager, the rights of the parties will not be altered. The insurer, it is true, is put in the place of the insured, but the liability of the inhabitants remains the same. In private contracts, whatever advantages result to the parties, third persons cannot avail themselves of them. If a landlord covenants for quiet enjoyment against all persons, in case of eviction he must make satisfaction to his tenant, but the trespasser shall not therefore be excused: the landlord must sue in the tenant's name. In actions of escape, if the jury give the whole debt, the sheriff shall sue the original

(b) *C. B., E. 32 G. 2, 2 Wilk. 91.*

debtor in the plaintiff's name. If this action had been brought before payment by the insurer, the plaintiff would recover less against him by the amount recovered. The insurer only pays what is not received from any other quarter. In the case of principal and factor, the one may use the other's name. This action is for a single satisfaction, and the Hundred must make satisfaction to somebody.

Adair, Serjeant, contra.—There is no reported decision on this point, and the argument on the other side goes entirely upon analogies, a very fallacious mode of reasoning. The policy of the act, in addition to the inducement to suppress riots, was to divide the loss, and prevent the ruin of individuals; but there is no reason for extending that object, beyond the party himself, to bodies, or to individuals, who have voluntarily exposed themselves to this danger. It is asked, could the trespassers have availed themselves of this defence? It is not necessary to answer that question, since it is only for a particular purpose that the inhabitants are put in their place. It might, indeed, be well argued, that the trespassers should be permitted to avail themselves of that defence; for though it is true that a man who has two remedies may pursue either of them, and that it is no defence to say he has another mode of proceeding, yet, where he has once availed himself of one remedy, and recovered, he shall not be allowed to pursue the other. It is not necessary to contend, that if the plaintiff had proceeded in the first instance against the Hundred, the fact of the insurance having been effected would have been a defence. The present case has been assimilated to that of a wager.—[Lord Mansfield.—It cannot be a wager, for then the sum must be paid both by the Hundred and by the office.]—Taking it to be a wager, the party losing will not be allowed to bring an action and say, "It was owing to you that I lost my wager." It must be an indemnity. Third persons cannot avail themselves, at law, of private contracts to which they are not parties, and therefore equity, in some cases, allows them to sue in another's name, since the forms of law will not suffer them to do it in their own. Here there is no such equity, for the insurers do not suffer by any act of the defendants. The whole risk was covered by the premium. If the loss had been suffered by the wrong of the defendants, the insurers would have been able to maintain an action on the case in their own name: but here the

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action being in the name of the plaintiff, who has received a complete satisfaction, cannot be maintained.

Wallace, in reply.—This is not the case of a double satisfaction, it is only using the plaintiff's name to recover a single satisfaction. Suppose the amount of the damage had been paid by a charitable contribution, would that excuse the Hundred?

LORD MANSFIELD.—The facts of this case lie in a narrow compass. The argument turns much on want of precision in stating the case, as most arguments do. The office paid without suit, not in ease of the Hundred, and not as co-obligors, but without prejudice. It is, to all intents, as if it had not been paid. The question, then, comes to this, Can the owner, having insured, sue the Hundred? Who is first liable? If the Hundred, it makes no difference; if the insurer, then it is a satisfaction, and the Hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear: the act puts the Hundred, for civil purposes, in the place of the trespassers; and, upon principles of policy, as in the case of other remedies against the Hundred, I am satisfied that it is to be considered as if the insurers had not paid a farthing.

WILLES, *Justice*.—I am of the same opinion. I cannot distinguish this from the case of the escape. The Hundred is not answerable criminally, but they cannot be considered as free from blame. They may have been negligent, which is partly the principle of the act.

ASHURST, *Justice*.—At all events the plaintiff must have a verdict for the amount of the premium, as to which he has received no compensation. But, on the larger ground, I agree with my lord, that it is like the case of an abandonment. They are not to be in a worse condition by paying without a suit.

BULLER, *Justice*.—Whether this case be considered on strict legal principles, or upon the more liberal principles of insurance law, the plaintiff is entitled to recover. Strictly, no notice can be taken of any thing out of the record. Taken in its narrow form, the contract is only a wager; more liberally construed, it is an indemnity. Still, upon the words, and as to third persons, it is only a wager, of which

third persons shall not avail themselves. It has been admitted, and rightly, that the Hundred is put in the place of the trespassers. How could they have availed themselves of this defence? By plea of accord and satisfaction? It was not paid as satisfaction, and the evidence would not have supported such a plea. In the case put of the escape, the recovery is not a satisfaction, and the sheriff may sue.

The better way is to consider this as a contract of indemnity. The principle is, that the insurer and insured are one, and, in that light, paying before or after can make no difference. I am, therefore, clearly of opinion, that the Hundred cannot avail themselves of this defence.

Postea to the Plaintiff (a).

(a) In the case of *Clarke v. The Inhabitants of the Hundred of Blything*, B. R., M. 4 G. 4, 2 B. & C. 254, 3 D. & R. 489, S. C., it was held, on the authority of the above case, that the receipt of the amount of the loss from an insurance-office would not prevent the plaintiff from maintaining an action against the Hundred on

statute 9 G. 1, c. 22. The present case appears, in principle, to be at variance with that of *Bird v. Randall*, B. R., M. 3 G. 3, 3 Burr. 1345, 2 W. Bl. 373. 387. S. C.; but the authority of the latter was questioned by Lord ELLENBOROUGH in *Godsall v. Boldero*, B. R., M. 48 G. 3, 9 East, 78.

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GREY v. COOPER (a).

THIS was an action on a bill of exchange, by the indorsee against the drawer. The declaration stated, that the defendant drew the bill payable to one *Walker*, who indorsed it to *Holbrook*, who indorsed it to *Shipden*, who indorsed it to the plaintiff. Pleas: 1. *Non assumpsit*; 2. That *Walker*, at the time of the indorsement by him, was an infant. Demurrer to the second plea.

Morgan, for the defendant, was desired by the Court to begin. It is stated that the infant was a person using trade and commerce; but, admitting that allegation to be mere form, the infancy is a good plea, as duress or insanity would be. It ought, at least, to be shown, that the infant was benefited by the indorsement, as that he received a

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The infancy of the payee is no answer in an action by the indorsee of a bill of exchange against the drawer.

(a) *Short note of S. C. 1 Setw. N. P. 287, 4th ed.*

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valuable consideration for it. *Thompson v. Leach* (b). *Lloyde v. Gregory* (c). *Br. Ab. tit. Coverture*, 40. *Roll Ab. tit. Coverture*, 728.

Davenport, for the plaintiff.—Perhaps this action might not be maintained against the infant himself; but the answer to the present objection is, that a man having made a negotiable instrument, shall not refuse to pay it to the person to whom it was given, or to the person to whom the payee was authorized by him to indorse it. A valuable consideration for the indorsement must be presumed; and as to the objection that the infant is not a trader, the defendant is estopped, by his having drawn the bill payable to the infant, from making that objection.

Lord MANSFIELD.—The ground on which the drawer is charged is, that he drew a bill by which he engaged to pay according to the order of the payee, whoever that payee might be. He might give the infant an authority which the law itself does not give him. In the same manner he may give a bill to his own wife. The drawer says, “let any body trust the payee on my credit.” The acts of an infant are void, or not, accordingly as they are for his benefit. The privilege of an infant is personal, and there is no question here as between the infant and another person. The infant sets up no claim, and the drawer is liable to pay. Judgment for the plaintiff (d).

(b) *B. R.*, T. 2 W. & M. 3 borough, 4 *Esp. N. P. C.* 187. *Mod.* 301. See also *Nightingale v. Wittington*, 15 *Massachusetts Rep.*

(c) *B. R.*, T. 14 Car. 1. *Cro. Car.* 502. 272, *Bayley*, 34, *American ed.*

(d) See *Jones v. Darch*, *Scacc. Pardessus, Droit. Com.* vol. ii. T. 57 G. 3, 4 *Price*, 300. *Taylor v. Croker*, *cor. Ld. Ellen-* p. 459.

Tuesday,
23d April.

EYRE v. LOVELL and Another.

A proxy made by a Canon to act for him in his absence, in all corporate business, is not revoked by the Canon making the proxy having, in an intermediate period, appeared and acted for himself.

THIS was an action of trespass for breaking and entering the plaintiff's house at *Wells*, tried before BULLER, Justice, at the summer assizes for *Bridgewater*. The jury found a special verdict, which stated, that the Dean and Canons residentiary of *Wells* had been, from time immemorial, a cor-

porate body, not exceeding eight, nor less than six: that they were seised, in fee, of the house in question, which had been used to be collated by grant under the common seal: that the Dean and Canons have been used to appoint, by an instrument called a proxy, one or more of the said Canons to act for such Canon in his absence, in all corporate business: that the Canon so appointed hath, during all the said time, continued to act without any new appointment or proxy, at meetings subsequent to any meeting where the person appointing had been present, and had acted for himself.

That *John Walker*, Clerk, one of the said Canons, seized of the house in question for his life, died on the 8th of *November*, 1780; that, on the 15th of *November*, the Dean summoned a meeting to make a collation of the said house; that the Dean and *R. Wilson*, another of the said Canons, voted for the plaintiff, and the Dean produced proxies from *Thomas Payne* and *Phipps Weston*, two other Canons, and gave their votes for the plaintiff; that *John Turner*, another Canon, produced proxies from *W. Blencowe* and *C. Moss*, two other Canons, and gave their votes and his own for the defendant. [The special verdict stated the proxies to the Dean at length. That from *Thomas Payne* had these words: "Make, nominate, constitute, and appoint the Right Hon. and Reverend Lord *Francis Seymour*, Dean of the said cathedral church, my true and lawful proctor, for me, and in my name, place, and stead, to appear," &c. That from *Phipps Weston* was nearly the same, but used the words "whenever I shall be absent."] That after the making of the said proxies, *Thomas Payne* and *Phipps Weston* had personally appeared and acted for themselves. That *W. Blencowe* and *C. Moss* had not appeared and acted for themselves. The Dean and his party collated the plaintiff, and afterwards the other party sealed a collation to the defendant. That the plaintiff entered and was possessed, and that the defendant disturbed him in his possession; but whether, &c.

Plumer, for the plaintiff.—It is objected to the plaintiff's two proxies, that after the proxies given the principals appeared in Chapter and voted, and thereby vacated their proxies. But neither by the rules of the canon law, nor by the usage as stated in the special verdict, were the proxies vacated. Wherever a person has a private right he may

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delegate it to another to act for him, when there is no personal duty necessary. *Domat. l. 1. c. 15.* It is indifferent to the rest of the world whether the man having the right acts in person or not. It merely regards the principal and his delegate; and the intention of the party governs the authority. *Dig. l. 17. c. 4.* There may be requisites as to the person of the proxy: thus, as to Chapters, the proxy must be a member of the Chapter; so, a proxy *ad litem* must be subject to the rules of the court. All the books distinguish between proxies *ad litem* and *ad negotia*; but where these personal requisites are not in question, the intention of the parties must govern. Did these persons, therefore, intend to give a limited or a general authority, to be vacated by their appearance, or to be extended beyond it? The situation of the parties requires a permanent proxy. The duties of Canon residentiary require occasional attendance upon the Chapter and occasional absence. According to the construction for which the defendant contends, the party might be obliged to make a proxy every time. It is more consistent, where the words are doubtful, to construe the proxy permanent. The words of one of the proxies are very strong—"whenever I shall be absent." The usage, also, has been invariable to act under these proxies in all absences. The other side, therefore, must show some rule of law controlling the intention of the parties. The appearance of the party himself can only operate by showing a presumed intention to revoke. But it is alleged that the authority is vacated by matters *dehors*. That can only be in one of three modes; by the destruction of the subject matter, by want of capacity, or by a change in the situation of the parties. But here the subject matter remains the same, there is no want of capacity, and the presumption of change of intention is rebutted by the acts of the parties. No writer has ever stated that appearance alone will vacate, unless in cases of proxies *ad litem*, and then the vacating is only presumptive, and is liable to be rebutted. *Menopius de Præsumptionibus. Baldus, Decret. l. 1. tit. 19, De Procuratoribus.* The proxy *ad litem*, if proxy *simpliciter*, is *dominus litis*. Process is served on him, and the suit is carried on in his name; the appearance of the principal, therefore, does afford a presumption of revocation. Having delegated the whole of his power, appearance certainly revokes part; but even there the presumption may be rebutted. An objection

may be founded on the usage of the *House of Lords*, and the practice at the *Bank*. The proxy of the *Lords* was originally by licence from the Crown; and writs, with an exception of the power of making a proxy, are to be found. 6 *Selden*, 1476. The power to make a proxy used to be given at the same time with leave of absence, and it followed, that when the absence expired, the proxy which was incident to it expired at the same time (a). Besides, the proxy of a peer is a proxy *simpliciter*. Originally, any person, though not a peer, might have been a proxy, and the number was not limited; but now, by the order of the House, there can be only two held by one peer. The practice at the *Bank* is peculiar to, and regulated by, that corporation, and cannot extend beyond the body which makes it. [Lord MANSFIELD. —They have a new fee on every letter of attorney.]

*Wilson, contra.*—Proxies, from their nature, are revocable by appearance. A proxy cannot be made irrevocable. The principal, by acting himself, resumes the power which he has given, and the subject matter of the proxy is destroyed. A new deed is necessary to revive it. In all the funds the practice is so, though there are no new fees, but new stamps. The *procuratores ad litem* resembled our attorneys, and were governed by the peculiar rules of the courts.

Lord MANSFIELD.—I cannot see a doubt in the question. The words in the two proxies amount to the same thing. The absences are frequent, the summons to attend short. The proxy must mean every absence. Some proxies relate to a particular absence, but here the proxy is general to act in absence. The appearance does not revoke it, because it is not contrary to it. In addition, we have the immemorial usage. There cannot be a doubt.

WILLES and ASHURST, *Justices*, were of the same opinion.

BULLER, *Justice*.—The custom does not require any precise form of proxy. On referring to the old form of proxies in the *House of Lords*, it will be seen that it was a condition annexed to the leave of absence, that the peer should appoint a proxy.

Judgment for the plaintiff.

(a) See 4 *Inst.* 13. *Com. Dig.* *Blackstone*, 168 (n).  
*Parl.* (D. 19), 1 *Christian's*

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Wednesday,  
24th April.THE KING v. STANLEY.  
(Reported, Caldecott, 172.)Thursday,  
25th April.THE KING v. THE JUSTICES OF BEDFORDSHIRE.  
(Reported, Caldecott, 167.)Friday,  
26th April.

SMITH, on the demise of JERDON, v. MILWARD.

A right of common cannot be reserved in an exception in a demise under the word "land." A right of common [whether appendant or appurtenant not stated in the case] cannot be severed from the land and converted into common in gross.

THIS was an action of ejectment, tried at *Stafford*, before NARES, *Justice*, when there was a verdict for the plaintiffs, subject to the opinion of the Court on a case which stated, in substance, as follows:

That the lands in question are parcel of a common called *Ashwood Hay*, in the manor of *King's Winford*. There were formerly within this manor three large commons, called *Ashwood Hay*, *Wall Heath*, and *Pinsnett*. In 1685, articles of agreement were made between the lord of the manor (Lord WARD) and the tenants. By these articles, the lord was to give up his right of warren over *Ashwood Hay* and *Wall Heath*, which were to be divided in allotments amongst the tenants, according to their respective interests, they paying eleven pence per acre yearly. The allotments were to be set out by metes and bounds, but not enclosed, and to be corn land when sown, and commonable at other times. The agreement was to continue for ninety-one years, with a clause, that the commoners, their heirs and assigns, and others who shall have the tenements for which the said commoners would have or claim a right of common, as thereunto belonging, are again to have and enjoy, &c. The common of *Pinsnett* was not included in the articles, but continued to be used as common, as before. The articles were confirmed, and the allotments made, under a decree of *Chancery*; and the term of ninety-one years expired on the 5th of *April*, 1776.

*Edward Milward*, seised *in fee* of a copyhold of inheritance held of the said manor, called *Brochmore*, de-

mised the same, according to the custom of the manor, in 1737, to *Andrew Jerdon*, his executors, &c. for ninety-nine years, "with all commons, hereditaments, rights, members, and appurtenances to the said farm and premises belonging," except to the said *Edward Milward*, his heirs, &c. "all lands in *Ashwood Hay* and *Wall Heath* in the said parish."

The plaintiff is administrator of the said *Andrew Jerdon*.

In the beginning of 1776, an act passed for enclosing *Ashwood Hay* and *Wall Heath*; and the commissioners assigned the land in question to the defendant *Milward* and the lessor of the plaintiff, in respect of a certain customary estate, (describing *Brochmore* farm), "according to their several and respective estates, rights, and interests therein, in full satisfaction for all rights of common belonging to them in, over, or upon the said common or waste lands in respect of the said estate."

The eleven pence an acre, payable to the lord by the articles of 1684, has always been paid by *Milward*. The whole of the lands in *Ashwood Hay* and *Wall Heath* were common, and used as such before the articles of 1684, and were divided and allotted by those articles. The tenants of *Brochmore* constantly used to take common on *Ashwood Hay* and *Wall Heath*, in right of that farm, at such times of the year when the same was open and commonable, till the enclosure under the act of parliament; and from the 5th of *April*, 1776, when the articles expired, to the 7th of *October* in the same year, when the commissioners made their award, *Ashwood Hay* and *Wall Heath* were used as common by the occupiers of land in the parish of *King's Winford*.

The question is, whether the plaintiff is entitled to recover.

*Plumer*, for the plaintiff.—It is clear that a right of common belonged to this farm; but the question is, whether that common belongs to the lessor or the lessee; that is to say, whether the common is included in, or excepted out of, the demise. The demise is of the farm, with all commons and appurtenances, &c., so that on the demise it is clear that commons would pass. But there is a clause, excepting to the lessor "all lands in *Ashwood Hay* and *Wall Heath*." In point of law, the lessor could not separate the common from the land to which it was appendant or appurtenant. The reason is obvious: the common is a right *in alieno solo*,

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and is to be measured by the *levancy* and *couchancy* of the commonable cattle on the land to which it is appurtenant. In cases of surcharge, the remedy formerly was by writ of admeasurement of pasture; but if the right of common can be separated, that remedy will be at an end. It is like other rights, as of way, or *turbary*, which cannot be severed from particular houses or farms. Whatever was the intent of the lessor, he had not the power to sever this common. 1 *Roll. Ab.* 401. But supposing that the lessor had such power, the words he has used express no such intent. The demise conveys the common, and the exception reserves *land*. Common will not pass by the word *land*. It is *nomen generalissimum* for corporeal, but not for incorporeal hereditaments. *Co. Litt. b. 1. c. 2. s. 4.* Where technical words are not ambiguous, the Court cannot construe them otherwise than according to their legal import; not even in a devise, still less in an exception like the present.

*Adair, Sergeant, contra.*—The question arises only on the exception. It may be admitted that the words of the grant are sufficiently large. It is a rule applicable as well to deeds as to wills, that the intent must govern, if not contrary to the rules of law. It is said that the common cannot be severed from the land and converted into common in gross. It is true that common *appendant* cannot be severed even for a moment, or turned into common in gross (a). But common appurtenant may be created at this day. *Co. Litt. 122 a, Danv. Ab. 804, pl. 7, Br. Ab. Com. pl. 1.* And the authorities show that common appurtenant for a certain number of beasts may be converted into common in gross (b). From the state of the common at the time of this demise, it appears that the intent of the lessor was to reserve it. He had nothing else in *Ashwood Hay* but this common, which at that time existed not in the shape of common, but was held by metes and bounds, when sown, subject to a right of common at particular periods of the year. If, by a legal subtlety, it is contended that, in consequence of the land again becoming strictly common by the expiration of the agreement, it is reunited to the demise, and that there is conferred upon the lessee what

(a) See *Musgrave v. Cave*, *R., E. 1 Jac. 1. Cro. Jac. 15; C. B., H. 15 G. 2, Willes, 322.* *Bunn v. Channen*, *C. B., M. 54 G. 3, 5 Taunt. 244.*

(b) See *Drury v. Kent*, *B.*

it was never in the contemplation of the lessor to grant, the answer is, that now, by the allotment, the right of common is converted into land which may be severed, and that it was so at the time of action brought. With regard to the word "common," in the granting part of the demise, it is satisfied by the common which passed in another estate.

This case has already been decided in the Court of *Common Pleas*, but with a variation in the statement of the circumstances. It was stated in the case there argued, that the common was appurtenant; whereas it does not appear here whether it was appendant or appurtenant. It was also stated there, that the tenant of the farm had never exercised any right of common over *Ashwood Hay*, whereas the contrary appears here. The Court of *Common Pleas* decided in favour of the present defendant.

*Plumer*, in reply, was stopped by the Court.

LORD MANSFIELD, after stating the case, said,—The question arises on the construction of the exception. On the one hand it is contended, that it means the qualified right of common under the agreement; on the other, that it means the original right of common which revived on the expiration of the agreement. It is to be observed, that at the particular periods of the year when the land was common, the lessee enjoyed the right of common, which distinguishes this case from that decided by the Court of *Common Pleas*. In fact, nobody but the tenant could enjoy the common belonging to the farm. It might be released, but it could not be transferred. The allotment, under the act of parliament, was given in lieu of the right of common, and for nothing else. The lessee was entitled to the right of common, and he is therefore entitled to the allotment.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—The word *land* properly means corporeal hereditaments, and shall be so taken, unless there be an express intent to extend the meaning. Here no such intent appears, and it is, therefore, unnecessary to say, whether, in point of law, if the intent of the parties had been to reserve the common, it might have been done.

Judgment for the plaintiff.

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Saturday,  
27th April.

MANNING v. GIST (a).

Policy on the ship *Elizabeth*, from *Tortola* to *London*, with warranty to sail with convoy for the voyage. The commander of the convoy sent a ship to bring up the merchantmen from *Tortola* (the usual mode of convoying ships from that place); but the ship so sent was not to form part of the convoy for the remainder of the voyage. The *Elizabeth* sailed with the ship so sent, but was lost before she joined the commander of the convoy. Held, that the warranty was complied with.

THIS was an action on a policy of insurance upon the ship *Elizabeth*, from *Tortola* to *London*, with a warranty to sail, with convoy for the voyage, on or before the 1st of *August*. The only question was, whether or not the vessel had sailed with convoy; and the following circumstances were proved at the trial: The *Cyclops*, Captain *Robinson*, was sent by *Sir C. Douglas*, the commander at *St. Kitt's*, to bring up the ships from *Tortola*, with orders, if they should get a certain way to the northward, to go straight for *England*. They sailed from *Tortola*; but the *Elizabeth*, being a bad sailor, fell to leeward several miles, and lost the convoy, and was afterwards captured while attempting to make the passage to *England* by herself. It was proved, that the usual way of convoying ships from *Tortola* was as in this case, the whole fleet not being able to get up to *Tortola*. The *Cyclops* was not one of the ships intended to form part of the convoy to *Europe*, but was only despatched by the commander to bring up the trade from *Tortola*, who were to join him in a certain latitude. It was contended at the trial, that the *Cyclops*, not being to take the vessels all the way to *England*, was not a convoy for the voyage, and that therefore the warranty had not been complied with; but Lord MANSFIELD was of a different opinion, and the jury found a verdict for the plaintiff. A rule for a new trial having been moved for,

The *Solicitor-General* and *Wallace*, in support of the rule, contended, that the warranty had not been complied with. The *Cyclops* was not a convoy to *Europe*. The convoy meant was the general convoy, which the vessel never joined. Suppose that orders had been sent by a merchantship for the *Elizabeth* to meet the commodore; if she had actually joined him, that would have been a sailing with convoy, but not unless she joined, up to which time she does not come within the warranty.

Lord MANSFIELD.—This case is very clear: The warranty never specifies the force of the convoy, which is always left to government. According to the policy she is to sail

(a) S. C. Shortly reported, *Marshall, Ins.* 367, 2d edit.

with convoy from *Tortola*; what constitutes the convoy, depends upon the usage. In fact, the fleet never go to *Tortola*, but the commodore sends part of his force to bring the merchantmen to him at sea. That is the convoy from *Tortola*; there can be no other. He may send a ship that is to go on with him, or he may not, if the service require it. Government may relieve, and change the ships. The sailing orders are given by *Sir C. Douglas*. There is no doubt that the *Elizabeth* joined the convoy appointed by government for the trade.

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Rule discharged (b).

(b) See *Audley v. Duff*, C. B., H. 40 Geo. 3, 2 Bos. & Pul. 111.

THE KING v. HARTLEY.

(Reported, Caldecott, 175.)

Wednesday,  
1st May.

THE KING v. INHABITANTS OF BAGWORTH.

(Reported, Caldecott, 179.)

Wednesday,  
1st May.

CROOK v. DOWLING (a).

Wednesday,  
1st May.

THIS was an action for maliciously holding the plaintiff to bail, tried at the *Chelmsford* assizes, before *ASHURST, J.* The declaration stated, that the defendant had sued out a *latitat*, which he had caused to be indorsed for bail, by virtue of an affidavit for that purpose filed. At the trial the plaintiff offered in evidence a copy of the affidavit to hold to bail, which the learned judge rejected, being of opinion that the original was the best evidence, and ought to have been produced. The plaintiff was accordingly *nonsuited*. *G. Bond* having obtained a rule for a new trial, on the ground that this evidence was improperly rejected,

In an action for maliciously holding the plaintiff to bail, the declaration stated, that the defendant had sued out the writ which he had caused to be indorsed for bail, by virtue of an affidavit for that purpose filed. Held, that a copy of the affidavit was admissible in support of this allegation.

(a) S. C. cited B. N. P. 14.



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*Mingay* showed cause.—The copy of the affidavit is not evidence. It has been said, that the affidavit, being in the nature of a record, cannot be taken away to be given in evidence; but the practice is otherwise. Every day affidavits are taken off the file by a judge's order, and are carried to different parts of the kingdom. In this case the action is for suing out the writ, and perhaps no evidence whatever of the affidavit was necessary; and there may be a new trial on that ground, but the copy of the affidavit cannot be evidence. [BULLER, J.—Affidavits are in fact carried down on security being given to the Clerk of the Rules.]

*Erskine* and *G. Bond*, *contra*.—The writ was offered in evidence, which was sufficient, and on that ground there must be a new trial. The writ proved the whole, being indorsed for bail by affidavit. [ASHURST, J.—I remember a doubt whether the affidavit was averred in the declaration; the averment being “by virtue of an affidavit filed,” &c., I thought it was averred.] It was certainly not averred that the defendant made the affidavit; within the statute (b) the affidavit may be made by others. The copy of the affidavit was offered in evidence only to show that an affidavit had, in fact, been made. *Cameron v. Lightfoot* (c). [BULLER, J.—You must take it with the qualification in that case.] *R. v. James* (d). [Lord MANSFIELD.—That cannot be law. *Bearcroft*.—The contrary was determined in *R. v. Morris* (d). *Mingay* read a note of *Peckham's* of *Walter v. Butler*, tried before Lord MANSFIELD, at *Guildhall*, in 1779, where the copy of an affidavit was rejected in evidence, and the distinction taken between an affidavit in the cause and an affidavit in another cause, according to the doctrine in *Cameron v. Lightfoot*]. The *gist* of the action was suing out the writ, and the copy of the affidavit was evidence that an affidavit made by some person was filed, the identity of the person not being in question. The original affidavit ought not to be removable; it is like a record, and it ought to remain on the file, in order to justify the officer who issues the writ. But even if removable, there are other documents partaking of the nature of records,

(b) 12 Geo. 1. c. 29.

(d) E. 4 W. & M. Carth.

(c) C. B., E. 18 G. 3. 2 W. 220.

Bl. 1190.

which, though removable, may be proved by copies, as the original books of a manor, and proceedings in Chancery.

LORD MANSFIELD.—The uncertainty of the law of evidence is owing to mistaken notes, which have turned particular cases into general rules. Now the whole law of evidence consists in applying general rules to particular cases, for almost all evidence is admissible or inadmissible, according to the circumstances of the particular case. In perjury, notwithstanding the case in *Carthew*, I doubt whether the copy of an affidavit would be evidence, because the handwriting is an essential part of the case to prove the identity. With that view an order was made by the Court of Chancery that all defendants should sign their answers. In *R. v. Morris* the handwriting was the only proof of the identity, which was an essential part of the case; therefore, in indictments for perjury, I think that the original should be produced. It may be procured by an application to the Court, or to a Judge in vacation, who will order the officer to carry it down, or to deliver it.

But it does not follow from hence that the copy of an affidavit cannot in any case be received in evidence. Here the declaration alleges, that the plaintiff was arrested under a writ indorsed for bail, by virtue of an affidavit before that time made. The defendant was proved to have sued out the writ, and to have delivered it to the bailiff, indorsed for bail. That proved the whole case. The defendant cannot be permitted to say that it was indorsed without affidavit. Perhaps if it had been averred that the *defendant made the affidavit* it might have been necessary to produce the original. If the writ had not been indorsed, the copy would have been sufficient to prove the allegation that the writ issued by virtue of an affidavit.

WILLES, *Justice*.—In an indictment for perjury, the copy of an affidavit is not evidence, and in this case the original might have been necessary if it had been averred that *the defendant made the affidavit*; but as the declaration is framed, the copy is sufficient evidence.

ASHURST, *Justice*, was of the same opinion.

BULLER, *Justice*.—I have not found any case contrary to that in *Carthew*, but I am sure such must have occurred. Wherever identity is in question, the original must be produced. I am of opinion that the copy was sufficient here, but I also think that the writ would have done alone. The

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indorsement is an admission by the original plaintiff (the present defendant) that an affidavit was filed.

Rule absolute (c).

(c) This case was referred to by Mr. Justice BULLER in *Webb v. Herne*, C. B., T. 38 G. 3, and his imperfect recollection of it appears to have misled him. He said it was only stated generally that "a writ was sued out, indorsed for bail, £——;" and he therefore distinguished it from that case, where the averment was "indorsed for bail by virtue of an affidavit filed of record." The Court, holding that this was a substantive allegation, which it was necessary to prove, and there having been no evidence of it beyond the writ, they were of opinion that the plaintiff was properly nonsuited. That case, therefore, is at variance with the opinions of the Judges in the present, which appears to rest upon sounder principles. In another case Mr. Justice BULLER held, that proof of the writ indorsed for bail was sufficient, without any evidence of the affidavit. *Rogers v. Ilcombe*, 2 Esp. Dig. N. P. 38. The very point decided in the principal case came before the Court of Common Pleas, in *Casburn v. Reid*, H. 58 G. 3, 2 B. Moore, 60, (an action for an escape), when, on the authority of a note of *Crook v. Dowling*, in *Buller's Nisi Prius*, p. 14, last edit., they held, that an office copy of the affidavit was sufficient; and they recognized the distinction between the common averment and an allegation that the affidavit was made by the party himself. The averment, "by virtue of an affidavit," &c. is superfluous, and need not be inserted. *Wil-*

*coxon v. Nightingale*, C. B., H. 8 & 9 G. 4, 4 Bingh. 501. See also *Sharpe v. Abbey*, C. B., M., 9 G. 4, 5 Bingh. 193.

In general, in civil proceedings, copies of answers in *Chancery* are sufficient. *Lady Dartmouth v. Roberts*, B. R., M. 53 G. 3, 16 East, 334; *Hennell v. Lyon*, B. R., M. 58 G. 3, 1 B. & A. 182; *Ewer v. Ambrose*, B. R., E. 6 G. 4, 4 B. & C. 25, 6 D. & R. 127, S. C.; *Dartnell v. Howard*, cor. *Abbott*, C. J., Ry. & Moo. 169. But in order to render the copy of an affidavit admissible, as against the party making it, some evidence must be given to connect him with it, as by proof of his signature, or by showing that he has used it. *Rees dem. Howell v. Bowen*, Exch. T. 6 G. 4, M. & Y. 383.

Although the case of *R. v. James* was denied by Lord MANSFIELD to be law, and although BULLER, J., stated that there must be cases to the contrary, none such appear in the books. As stated in *Cartham*, there was no evidence to connect the defendant with the affidavits; but in the report in 1 Shower, 397, the Court said, "The affidavit being of the defendant in the cause, and used by him, upon motion in Court, it's enough, otherwise if not so; but a copy of an affidavit only produced against a man, without proof that he made it, used it, or was concerned in the cause, would be insufficient." In this view the case was recognized by HULLOCK, B., in *Rees v. Bowen*, *supra*.

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MAYNE and another v. WALTER (a).

Friday,  
3d May.

THIS was an action on a policy of insurance. The declaration stated, that the plaintiffs, on the 26th of April, 1781, made a policy of insurance on the ship called the *N<sup>a</sup> S<sup>a</sup> de Paidade et San Francisco*, a *Portuguese*, at and from *Madeira*, to the ship's port or ports of discharge in *Jamaica*, with liberty to touch and call at any of the *West India* islands, valued at £1305, at 12 guineas per cent.; to return £3 per cent. for what should be discharged at the *Windward* or *Leeward* Islands; and the ship was warranted free from British captures in port and at sea.

A Portuguese ship was insured and warranted neutral. She carried an English supercargo, a fact which was not known to the underwriter, and which was contrary to a French ordonnance. On this ground she was captured, and condemned as a prize. Held, that the underwriter was liable.

That the defendant underwrote the policy for £150.

The plaintiffs aver, that the said ship was a *Portuguese* ship, and that one *Joan Francisco de Freitas Esmeraldo* was interested in the said ship and her freight: that the said ship was captured, in her voyage, by certain subjects of the French king, by reason whereof the defendant became liable to pay to the plaintiffs the sum insured by him.

There were other counts for money paid, and money had and received, to the plaintiff's damage of £200.

The defendant pleaded the general issue, *non assumpsit*.

The cause came on to be tried at the sittings after *Hilary Term*, 1782, at *Guildhall*, before Lord MANSFIELD, when the jury found a verdict for the plaintiffs, damages £131, 2s., costs 40s., subject to the opinion of the Court on the following case.

That the ship insured was the property of *Joan Francisco de Freitas Esmeraldo* (named in the declaration), of the island of *Madeira*, a *Portuguese*.

That Messrs. *John Searle* and Co., of the island of *Madeira*, who were agents for the said owner in ordering the insurance in question, were part owners of the cargo loaden on board her, and knew that *Robert Thompson*, an *Englishman*, who was also interested in the cargo, was to go as supercargo on board the said ship; but this fact was not communicated to the defendant.

That the ship was taken, on her voyage, by a *French*

(a) *S. C. Park Ins.* 263, 6th ed.

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privateer, and condemned (setting out the sentence of condemnation), by reason that the said *Robert Thompson* was supercargo on board.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover in this action?

*Piggot*, for the plaintiffs, contended that the having an *English* supercargo on board did not make the ship other than neutral property.

*Haworth, contra*, said that this was a new case: that the question was, what was the import of the warranty, "that the ship was a *Portuguese* ship?" This, as he contended, was, "that the ship should receive such protection during the passage as would belong to a neutral ship." Here, by an act imputable to the insured, the ship is captured and condemned; being condemned on the single ground that she had an *English* supercargo on board. All belligerent nations make rules for the navigation of neutral vessels. By a *French* ordonnance of 1778 (similar to another in 1756), it is provided that the supercargo, and certain other officers mentioned, must not be natives of a country hostile to *France*; and that if they be so, the ship shall be deemed lawful prize. The *French* court, acting on this ordonnance, condemned the ship as enemy's property. To whom, then, is this loss attributable? Certainly not to the underwriter, who was ignorant of the fact, with which the party who made the insurance was acquainted. The ship, by the act of the insured, was not a neutral ship for the purpose of being protected.

Lord MANSFIELD (stopping *Piggot*).—It does not appear that either of the parties knew of this ordonnance, which is arbitrary, and contrary to the law of nations. By the law of nations there is no difference between enemy's property and an enemy's subject being on board. The parties are both innocent, and the underwriter who takes the risk ought to be the sufferer. As to any treaties between *France* and *Portugal*, not a word is said about them. Neither party seems to know any thing about them, and yet the whole case turns upon them.

Judgment for the plaintiffs (*b*).

(*b*) See *Barzillai v. Lewis*. *Johnson*, H. 25 G. 3, post. T. 22 G. 3, post; & *Saloncci v.*

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3d May.

LE CRAS v. HUGHES (a).

THIS was an action on a policy of insurance dated the 29th of December, 1779, at and from *St. Fernando de Omoa* to London, on goods, &c., on the ship *St. Domingo*, a Spanish prize to the squadron under Captain *Luttrell*. The cause was tried at *Guildhall*, before Lord MANSFIELD, and a verdict was found for the plaintiff, subject to the opinion of the Court on a case stating

That Captain *John Luttrell*, commanding a squadron of his majesty's ships, consisting of the *Charon*, *Lowestoffe*, *Porcupine*, *Racehorse*, and *Pomona*, and Captain *W. Dalrymple* commanding some land forces, proceeded together, during the present war with *Spain*, to take two Spanish register ships—of which the *St. Domingo*, mentioned in the declaration, was one—lying afloat, at anchor, in the harbour of *St. Fernando de Omoa*, under the protection of the fort there; which fort, ships, and their cargoes, were a joint capture to the said squadron and land forces. That the defendant underwrote the policy stated in the declaration for £500, at a premium of 20 guineas per cent. That the ship *St. Domingo* sailed, with convoy, on the insured voyage; and that the said ship, and great part of the property on board her, were lost, by the perils of the seas, on that voyage. That the interest intended to be covered by this insurance was that of the officers and crews of the said squadron.

The question for the opinion of the Court was, “Whether the officers and crews of the said squadron had an insurable interest in the said ship *St. Domingo* and her cargo.”

*Erskine*, for the plaintiff.—The first clause in the prize act (b) is the only material one. The objection is, that this being enemy's property, and vesting in the Crown, and not being devested and given to the captors by any of the prize acts, does not confer any insurable interest. It was admitted, in *Lindo v. Rodney* (c), that the property vests in the Crown, but not till condemnation. The questions, then,

A squadron of ships of war, assisted by land forces, having captured two Spanish register ships, Held that the officers and crews of the squadron have an insurable interest in the ships captured under the prize act 19 G. 3, c. 67, before condemnation. An average loss opens a valued policy.

(a) S. C.; but not so fully reported, and without the arguments. *Park on Ins.* 358, 6th ed.; *Marsh. Ins.* 108, 2d ed.

(b) 19 G. 3, c. 67.

(c) B. R., *H.* 22 G. 3, ante, vol. ii. p. 613 (n).

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will be, 1. Whether the insured had an absolute vested interest; 2. Whether, supposing the case not to be within the prize act, possession did not give the captor an insurable interest. 1st. This comes within the prize act; and the junction of persons not entitled shall not deprive those who were entitled. The *French* prize act, 19 *Geo. 3, c. 67*, after reciting the proclamation of hostilities, gives the captors the property in all ships, &c. taken from the *French*. This was followed by a declaration of hostilities against *Spain*, and (parliament not sitting) a proclamation was issued for vesting the property in the captors; after which the *Spanish* prize act passed (*d*). The proposition intended to be insisted on, upon the other side, is, that the land forces being jointly concerned in the capture takes it out of the statute. It does not appear, from the case, that this was not a mere sea-capture, and that the soldiers were not on board. But it may be admitted that they were landed. In fact, the troops landed and silenced the fort of *Omoa*, and then the ships took the register vessels. In case of a prize taken by a commissioned ship and a non-commissioned ship, the practice of the *Admiralty* is to adjudge the prize to the commissioned ship, and to give a share to the non-commissioned ship *pro opere et labore*. Suppose the *St. Domingo* had been driven on shore, and the soldiers and sailors together had boarded her, shall that accident revest the ship in the Crown? In the case of *Louisbourg*, in the war before the last, two *French* ships sailed into the harbour, being decoyed by *French* colours, and were taken by the men-of-war. The *Court of Admiralty* adjudged it to be a joint capture by the land and sea forces; but, on appeal, the *Privy Council* reversed that sentence, and adjudged it a sole prize to the fleet. This case is not cited to show that here there was a sole capture, but to prove, that when the land forces made their claim, it was never supposed that the capture belonged to the Crown. But, 2. Supposing this case not to come within the prize acts, yet the legal seizure, and possession, and the special property arising from the expected bounty of the Crown, confer an insurable interest. It would clearly have been a good insurance before the statute (*e*). The preamble of the statute sets forth the object of the legislature in passing it, to prevent "a mischievous kind of gaming

(*d*) 20 *G. 3, c. 23*.(*e*) 19 *G. 2, c. 37*.

under pretence of insuring." This policy does not come within the description of those mentioned in the enacting part of the statute. The *interest* there mentioned does not mean an indefeasible property, it means such an interest as a person may have in property which he has a reasonable expectation of acquiring. Here the assured had an actual special property—such a property as would have sustained trover, or would have been sufficient to maintain an indictment in case of larceny. That special property remained in the captors until the Crown came in, and, by prosecuting to condemnation, divested the property out of the captors; but the defendant produced no such condemnation. Suppose a neutral ship is taken which cannot be condemned, the captor has a right to insure, because he is liable in damages, and is interested in the preservation of the vessel. Suppose again, that a third person, after setting up a claim to a vessel insured, releases his right to the assured, shall the insurer say, "If that suit had gone on, you would have been found to have no interest?"

*Scott, contra.*—Since the statute 19 *Geo. 2*, contracts of insurance are contracts of indemnity. The party insured must have an interest recognised by law, and must show a damnification. It is admitted on all hands, that all property taken by the king's military and naval servants becomes, by the capture, and before condemnation, the property of the Crown. This was doubted, and formerly held otherwise; but it is now completely settled, both here and in other countries. The insured must show an interest in one of three modes: 1. By grant from the Crown, by some instrument whereby the Crown signifies its pleasure, or by act of parliament; 2. By showing a reasonable expectation of reward, from the state giving an inchoate right amounting to an insurable interest; 3. By proving legal possession. It will be more convenient to consider the second question in the first instance. This is not an interest in a legal sense, and within the meaning of the statute 19 *Geo. 2*. There is no legal right for which there could be a remedy by suit. It has been held, that persons who are within the prize acts may grant before condemnation, because the condemnation has relation to the time of the capture; *Morrough v. Comyns* (f); but the right of a captor under the prize acts

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(f) *C. B.*, *E. 21 G. 2*, 1 *Wils.* 211.



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is very different from the right set up here, which consists merely in expectation. That expectation may be disappointed: and though an expectation from charity or generosity is an interest in some sense, yet it is not so in contemplation of law. There are occasions on which it might be proper to withhold such a gift, as in cases of public emergency. If the Crown has not granted by proclamation, or act of parliament, which is here assumed, it may yet grant the whole to the army. Mr. *Luttrell* may perhaps have sold his expectation for a large sum, but that will not convert it into a legal interest. The son of a merchant who is dying has no insurable interest in his father's property. There is no interest in law, however contingent, which may not be vindicated by suit, or the evidence of which may not be perpetuated by a court of equity (g). Could such a bill have been maintained by Captain *Luttrell*? Or if he had become bankrupt, had he any interest which would have passed to his assignees? To hold possibilities like this to be insurable would let in unlimited gaming. If the son might insure, why not the grandson? There would be no end of trials on reasonable expectations. It would be mischievous, too, in another point of view, as a temptation to destroy the ship and cargo. Suppose the captors heard that the Crown meant to make a different disposition, it would be their interest to destroy her. In the case of *Lowry v. Bourdieu* (h), the interest was held not to be insurable, though, in common apprehension, there certainly was such an interest. The next question is, Had the captors any interest by grant from the Crown? The word "soldiers," used in the proclamation and prize acts, means *soldiers on board, and under the command of a naval officer*, which was not the case here. A joint military and naval force is not intended by the prize acts; and the capture, therefore, was made by a class of persons neither at the time of the capture or of the loss the object of the bounty of the Crown. If the soldiers had been usually on board, and under the command of sea officers, their being occasionally on shore might not bar them; but, in this case, the forces were distinct, and under different officers. [Lord MANSFIELD. —It is determined, in several cases, that *soldiers on board*

(g) See the observations of N. R. 324.

Lord ELDON in *Lucena v. Crau-* (h) B. R., M. 21 G. 3, ante,  
*jurd, Dom. Proc. 2 Bos. & Pul.* vol. ii. p. 468.

means such as are the complement of the ship.]—The case of *Louisbourg* was not a joint capture, although the governor threw out the flag. No one there had an interest to claim for the Crown. The last point is, whether the possession of the insured was sufficient to constitute an interest. In general, as against a third party who has no right, a person in possession may maintain an action. The third party, having no title himself, cannot object to that of the person in possession. But the underwriters here stand in a different situation: they may lose the value of the property, while the wrong doer can lose nothing. Captain *Luttrell*'s possession is merely that of a servant of the Crown. Can the Court call that a property? Would he have been liable in case the vessel had been lost on the passage? Still, it is said, there may be cases in which he would be liable, and the case of a neutral ship has been mentioned. But suspicious circumstances are considered, by the *Admiralty*, as an excuse for taking neutral property, so as to prevent the recovery of costs and damages; and a loss, in the meantime, without blame, will not fall on the captor. [Lord MANSFIELD.—It must depend on the question of neutral or not neutral.] The case of a ship found at sea comes nearer. The finder has a property against all but the owner; but can he indemnify himself against a loss which in fact the owner sustains? The insurance might have been in the name of the Crown; but Captain *Luttrell* has suffered no loss in a legal sense, and can claim no indemnity.

*Erskine*, in reply, was stopped by the Court.

Lord MANSFIELD.—The defendants have set up a most unfavourable defence. At the time of the insurance being effected they were as well acquainted as Captain *Luttrell* with all the circumstances of the case; they knew that Captain *Luttrell* had no intention whatever of effecting a gaming policy, and yet they have not even offered to return the premium. At the same time, the plaintiffs have done wrong in defending a good cause like a bad one, by a collusive condemnation. The question, whether the sea-officers had an insurable interest, depends, 1. On the prize act and proclamation; or, 2. Putting the act and proclamation out of the case, on the possession, and on the expectation, warranted by almost universal practice. The first is the strongest ground, because it gives an interest which will support an action. The whole that is taken is given to the navy. Is it necessary that they should solely take? Sup-

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pose the British fleet acting with an allied fleet, and that prizes are taken, can it be said that the act gives nothing because they cannot take all? So, where captures are made by ships of war and privateers, it rests with the *Admiralty* to apportion the prize, yet what remains for the ships of war is within the act. Where ships of war, and ships not commissioned, make a capture, the navy shares notwithstanding the *droit* of *Admiralty*. It is a most extraordinary proposition, that if a ship makes the capture alone she shall have all, but that if she has a little assistance she shall have nothing. Where soldiers assist, their right may be doubtful; but that will not take away the right of the navy. If this be correct, there is an end of the question. But, 2. Is the expectation a sufficient interest? Wherever a capture has been made, since the Revolution, by sea or land, the Crown has made a grant: there is no instance to the contrary. Then, is the contingency of the ship's coming home a risk which the captors may provide against? It has been properly said, that since the statute of *Geo. 2*, insurance is a contract of indemnity. An interest is necessary, but no particular kind of interest is required. Master *Holford's* insurance was not a legal interest; but in *Grant v. Parkinson* (i) the profits of a voyage, though not a vested interest, were held insurable. An agent of prizes may insure his profits though they are in contingency (k). Such an insurance prevents risks from neutral claims; it also guards against a loss arising from the disappointment of an expectation which hitherto has never been disappointed. On either ground I think the policy a good one.

The next question is as to the mode of computing the loss. The soldiers have a share by agreement, which reduces the share of the navy to much less than the sum insured. I thought, at first, that this resembled the case of *Lewis v. Rucker* (l), which we think right whenever the goods are described as by hogsheads, &c. The constant usage has been, where it is a total loss, to pay the whole; but where it is an average loss, it opens the policy. We have found the original of this custom: it arose from a case at *Guildhall*, *M. 21 Geo. 2*, *Erasmus v. Banks*, before Lord Chief Justice *LEE*, where it was agreed that the word *valued*

(i) *B. R.*, *M. 22 G. 3*, ante, *B. R.*, *M. 39 G. 3*, 8 *T. R.* 23. p. 16.

(l) *B. R.*, *E. 1 G. 3*, 2 *Burr.*

(k) See *Craufurd v. Hunter*, 1171.

is an estoppel on both parties in case of a total loss, but not in case of a partial loss (*m*). Another case was cited where the same point was ruled. This appears to us to be a reasonable rule, and therefore we are of opinion that the computation must be made on the real interest on board.

*Postea* to the plaintiff (*n*).

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(*m*) See *Park Ins.* 291, 6th ed.

(*n*) The authority of this case was fully recognised by seven of the Judges in the case of *Lucena v. Craufurd*, *Dom. Proc.* 2 *Bos. & Pul. N. R.* 294. "The case of *Le Cras v. Hughes* was a case of mere expectation, and the circumstances were not near so strong in favour of the assured as the circumstances of this case. The doctrine there laid down by that expositor of marine law, Lord MANSFIELD, twenty-four years ago, has been recognised as law in subsequent cases; and if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds. The interest of the captain, in *Le Cras v. Hughes*, was not certain, yet it was all but certain that the property would be given according to the custom of the Crown in such cases. Captain *Luttrell* had an interest for which he would not have taken £20,000; and it would be a strange thing that he should not be allowed to insure that interest against the perils of the sea. There is a decision of a foreign Court of Prize very nearly corresponding with *Le Cras v. Hughes*, in 2 *Valin. article* 15, *fo.* 57. By the French ordinance, future profits were prohibited to be insured. The

author, in commenting on the article, says, 'It is not a future profit to insure a prize already taken, although the prize be not acquired with certainty until it be brought within the ports of the realm,' and then cites an adjudication by the parliament of *Aix*." In *Routh v. Thompson*, *B. R.*, *T.* 49 *G.* 3, 11 *East*, 433, Lord ELLENBOROUGH made the following observations upon the principal case. "In *Le Cras v. Hughes*, which was cited in argument, part of the captors at least, viz. the seamen, were considered as having a vested right in the ship and cargo, as prize, to a certain extent; and the Court decided, that the capture was within the prize act, and the captors had therefore a right vested by that act. It is true that another question (which Lord MANSFIELD considered as by no means the strongest) was raised—whether possession and the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounted to an insurable interest; and the Court gave a decided opinion that it did. But what fell from Lord ELDON in *Lucena v. Craufurd*, 2 *New Rep.* 323, is materially at variance with the decision of the Court of *K. B.* on that point. However, if the authority of that case were unquestionable upon both the points decided, yet what was held by the Court of *K. B.*, in respect to a contingency of the

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nearly certain kind which was then under consideration, would afford no rule to govern a case circumstanced like the present."

With regard to the insurance of the interest of the Crown, or of the captors, in case of capture, see *Routh v. Thompson*,

*B. R.*, T. 49 G. 3, 11 *East*, 428; *Stirling v. Vaughan*, *B. R.*, M. 50 G. 3, 11 *East*, 619; *Routh v. Thompson*, *B. R.*, H. 51 G. 3, 13 *East*, 274; *Crausurd v. Lucena*, 3 B & P. 75, 2 *New Rep.* 269, *Park Ins.* 361, 6th ed. S.C.

Saturday,  
4th May.

LOWNDES v. LEWIS (a).

A clergyman having a living of less than £150 per annum, is not qualified, under stat. 5 *Anne*, c. 14, to kill game.

THIS was an action of debt for penalties under the game laws (b), for keeping and using a greyhound, tried at the *Oxford* assizes, before HEATH, J. The plaintiff made out a case entitling himself to two penalties. The defendant insisted on a qualification as vicar of a living of the clear yearly value of £100. A verdict having been found for the plaintiff, with leave for the defendant to move to enter a nonsuit, a rule to that effect was granted.

*Haworth* and *Bower* showed cause.—The question which arises on the clause in the statute 22 and 23 *Car. 2*, c. 25, (c) is, whether, in order to bring the qualification within that act, a clergyman must have a living of £100 or £150. If any doubt arises on the clause, it is removed by referring to the prior statutes of 1 *Jac. 1*, c. 27, s. 3, and 7 *Jac. 1*, c. 11, s. 7, where the distinction is drawn between an estate of inheritance and an estate for life. The repealed statute, 13 *Ric. 2*, c. 13, makes a difference in the qualification for killing game between spiritual and lay persons, requiring that a clergyman should have £10 a-year, which at that period almost amounted to a prohibition. That statute being repealed, and there being no mention of spiritual persons in the later statutes, it does not appear that spiritual persons are in any case qualified. At all events, not having

(a) *S. C. Cald.* 188.

(b) 5 *Anne*, c. 14, s. 4.

(c) By this statute, s. 3, "All and every person and persons not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of £100 per annum, or

for term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of £150 (other than the son and heir-apparent of an esquire), are hereby declared to be persons, by the laws of this realm, not allowed to have or keep," &c.

an estate of inheritance, they are only qualified, like persons having an estate for life, where it amounts to £150. *Com. Dig. Justice of the Peace* (71). It cannot be said that a rector or vicar has the absolute fee, though it is otherwise with regard to bishops and abbots. He has only the fee for some special qualified purposes for the benefit of the church. That he has not the absolute fee, appears from his inability to maintain a writ of right—the writ of *juris utrum* being the highest writ which he can maintain. The real question is, whether the words of the statute, as to the term of life, relate to the prior or the subsequent part of the clause.

*Adair, Serj. contra.*—The act cannot be construed so as to throw the words “for term of life” into the clause of leases. The distinction between freehold and leasehold estates is clear and well known; and when there is an expression in an act of parliament which coincides with this well-known distinction, such distinction will be adopted. The argument on the other side goes to this—either that a benefice is no qualification, or that it is a qualification to the amount of £100. If necessary, it might be contended that a parson has something more than an estate for life. It is to him and his successors, instead of to him and his heirs. It is as great an estate as any corporation can have.

LORD MANSFIELD.—To make sense of the act we must reject the word “having.” If we do not, persons having leases for ninety-nine years are disqualified (d).

WILLES, *Justice.*—I have some doubts. It has always been understood that a clergyman having £100 a-year is qualified; and it is a rule of construction always adopted in doubtful cases, that the usage shall govern.

ASHURST, *Justice.*—I have no doubt at present. The act, as it stands, is nonsense. We must either add the word “not,” or reject the word “having.” If you reject that word you make the statute clear. I think the defendant was not qualified.

BULLER, *Justice.*—I think there is no doubt. The statute of *Charles*, as it stands, is nonsense. In adding or rejecting it is necessary to recur to former acts, which have

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(d) For instance, “Every person *not* having an estate of inheritance or for life, or *having* a lease for any term of years, is declared to be a person, by the laws of this realm, not allowed,” &c.—*Note by Mr. Caldecott.*

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great weight in construing a statute in *pari materia*.  
Leaving out the word "having," makes the statute clear.

Rule discharged.

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COLMAN v. GODWIN (a).

Words im-  
puting a crime  
are actionable,  
although they  
describe it in  
vulgar language,  
and not in  
technical terms.

THIS was an action for words charging the plaintiff with sodomitical practices. The declaration contained several counts, one of which, reciting that there was a suspicion of one *Hooper* being guilty of sodomitical practices, stated a colloquium about him and the plaintiff being guilty of such practices, and that in that discourse the defendant spoke the following words: "I have seen *Colman* go into *Hooper's* house and stay there all night, instead of going home to his wife." *Innuendo*, that the plaintiff had been guilty of sodomitical practices with *Hooper*. The jury found a verdict for the plaintiff with £500 damages; and the defendant having moved in arrest of judgment,

*Lee, S. G., Wilson, and Piggot*, showed cause.—It has been long held that the sense of the words is a matter to be left to the jury; it was properly so left in this case, and they have found that the words were spoken with the meaning attributed to them by the plaintiff. The most innocent words may be spoken in such a manner as to be actionable. The finding of the jury is conclusive, be the words what they may, otherwise there is an end of the office of an *innuendo*.

*Wallace, Bearcroft, and Baldwin, contra*.—The words themselves must afford a strong suspicion of the sense put upon them by the *innuendo*; and the *innuendo* will not carry the meaning of the words any further, or render them actionable, when without the *innuendo* they would not be so. *King v. Bowen* (b). Actions of this kind are only maintainable where the words imply a criminal charge; but no indictment would lie for "sodomitical practices."

Lord MANSFIELD.—It is objected that the law knows no such crime as sodomitical practices; but the real question is, whether the words spoken do not, in vulgar parlance, signify

(a) S. C. from the MS. of (b) B. R., E. 19 Jac. 1, *Hull*.  
GIBBS, C. J., 2 B & C. 285 (a). 44.

an offence which in law is termed an assault with intent to commit sodomy. The colloquium renders this plain. All words depend for their meaning on the subject-matter, and that is to be left to the jury.

WILLES, *Justice*, of the same opinion.

ASHURST, *Justice*.—I am of the same opinion. The effect of the words on the hearers is what is to be considered. The determinations in the old books are a disgrace to the law.

BULLER, *Justice*.—Could these words bear the meaning that the defendant intended to impute sodomy? They certainly may. The meaning of the words is to be gathered from the vulgar import, and not from any technical legal sense.

Rule discharged (c).

(c) The office of the *innuendo* is, in fact, only to connect the libel with the introductory averments, as in the present case. It cannot extend the meaning of the words, nor can it explain them unless by reference to the introductory matter. See *Goldstein v. Foss*, B. R., H. 7 & 8 G. 4, 6 B. & C. 154; 4 Bingham 489, 1 Saund. 243 (n). The rule that words are to be taken in *mitiori sensu* has been long abandoned. *Woolnoth v. Meadows*, B. R., M. 45 G. 3, 5 East, 463; *Roberts v. Camden*, B. R., M. 48 G. 3, 9 East, 96.

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The KING v. WHITE and ELING, Overseers, &c.  
(Reported, Caldecott, 183.)

Saturday,  
4th May.

POLE v. HORROBIN (a).

Tuesday,  
7th May.

DEBT on bond.—Plea craves *oyer* of the condition, which was for payment of £50, “in case the defendant should not procure *John Hadwen Cooper*, then impressed, &c. to appear and deliver himself to the plaintiff whenever he should

Debt on bond conditioned to pay £50 in case defendant should not procure *J. H.*, then im-

pressed, to appear and deliver himself whenever he should be called upon. 1st plea: That *J. H.* was not called upon, &c. 2d plea: That *J. H.* was unlawfully impressed; and that it was unlawfully agreed between the plaintiff and *J. H.*, that the plaintiff should discharge *J. H.*, who should pay as a gratuity, &c.; and that defendant, at the request of *J. H.*, became bound for the payment. Replication to first plea: That the plaintiff called upon and required the defendant to procure *J. H.* to appear. Special demurrer thereto, and general demurrer to 2d plea. Held that both the 1st and 2d pleas were good.

(a) S. C. 9 East, 416, partially reported.



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be called upon;" and pleads, 1. That *J. H.* was not ever called upon to appear and deliver himself to the plaintiff, according to the form and effect of the said condition. 2. That *J. H.* was not liable to be impressed by any law, &c.; and, having been unlawfully impressed, the plaintiff was unwilling to discharge him unless he would agree to pay, &c. and would procure the defendant to become bound; and that it was unlawfully agreed that the plaintiff should discharge *J. H.*, and that *J. H.* should pay, &c. as a gratuity and reward, &c.; that defendant, at the request of *J. H.*, did become bound for securing the payment, &c. corruptly and unlawfully demanded, &c.; by virtue of which said several premises, the writing obligatory, so made as aforesaid, was and is void in law, &c. 3d Plea, setting out the impress warrant, by which the plaintiff was directed to take no money, &c. for sparing, exchanging, or discharging, &c.; that it was unlawfully agreed that the defendant should make such bond, in consideration of the plaintiff's discharging *J. H.*, &c.; that the bond was in fact made, and *J. H.* discharged, contrary to the duty of the plaintiff, and in disobedience of the warrant, by virtue, &c. Replication to first plea:—That the plaintiff called upon and required the defendant to procure *J. H.* to appear, &c. General demurrer to the second plea. Replication to third plea, traversing the consideration alleged. Demurrer to replication to the first plea; and shows for cause, that the replication neither confesses, nor avoids, nor denies the matter alleged in that plea, viz. that *J. H.* was never called upon. Joinder in demurrer to the second plea. Rejoinder to replication to the third plea, taking issue on the traverse. Joinder in demurrer, on demurrer to replication to first plea.

*Wood*, for the plaintiff.—There are two questions on these demurrers: 1. Whether it was incumbent on the plaintiff to call on the impressed man to surrender, or to call on the defendant to surrender him; and 2. whether the defendant can be permitted to controvert the legality of the man's impress.

The condition of the bond is, that the defendant shall procure *Cooper*, the impressed man, to be delivered up whenever he shall be called upon. The wording is inaccurate and ambiguous; but the meaning must be, that the defendant, and not the impressed man, is the party to be

called upon. But supposing the words should relate to the impressed man, they still cannot mean that he should have personal notice, but merely signify "whenever there shall be occasion for him to appear."

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The objection to the second plea is, that it is inconsistent with the condition of the bond; and it is a rule of law that no one shall be permitted to aver contrary to the condition of his bond. *Jenkins*, 166; *Foden v. Haines* (b); *Downing v. Chapman* (c). [BULLER, J.—That case was determined more on the form than on the substance of the plea. Three judges were against GOULD, J., on the ground that you cannot aver a different consideration from that which is stated. *Wallace, A. G.*, said, that the proceedings in *Downing v. Chapman* were staid on the authority of *Collins v. Blantern* (d)]. A man is estopped from controverting a fact which he has admitted by his deed. *Paramoure v. During* (e); *Germin v. Randall* (f); *Hart v. Buckminster* (g); *Salter v. Kidley* (h); *Atkinson v. Coatsworth* (i). Here, on the face of the condition, it appears that *Cooper* was *impressed*, which, *ex vi termini*, signifies a legal impressment. If not legal, why was it stipulated that he should return? But supposing that it does not mean a legal impress, it is still immaterial. If illegal, *Cooper* had a proper remedy; and if he does not think fit to avail himself of the illegality, it shall not be permitted to a third person, who has undertaken that *Cooper* shall return, to set up the illegality for his own protection.

*Law, contra.*—The first question is, Whether the calling upon the defendant is a virtual calling upon the impressed man. The Court will not put a meaning upon a deed different from that which it exhibits on the face, nor construe it liberally to occasion a forfeiture. The calling upon the impressed man is made a condition precedent; and, however difficult, it becomes the business of the party who has entered into the condition. Conditions precedent can be

(b) *B. R., E. 6 W. & M., Moore*, 420.

*Carth.* 300.

(f) *B. R., H. 1 Jac. 1,*

(c) *C. B., M. 6 Geo. 3, Noy*, 79.

cited 9 *East*, 414. See *Id.* 421.

(g) *B. R., E. 24 Car. 1,*

Error was brought, but the suit was not prosecuted.

*Alleyne*, 52.

(d) *C. B., E. 7 Geo. 3,*

1 *Show.* 59.

2 *Wils.* 347. See 9 *East*, 421.

(i) *B. R., E. 8 Geo. 1, 1 Str.*

(e) *B. R., M. 37 & 38 Eliz.,* 512.

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vacated only in three ways: 1. Where the act becomes naturally impossible; 2. Where it becomes impossible by operation of law; and 3. Where it becomes impossible by the act of the other party.

However difficult a condition may be, yet, if undertaken, it must be performed. Here the plaintiff has stipulated that there shall be a personal calling upon of the impressed man, and that stipulation must be performed. The calling upon the impressed man means a personal request. *Gruist v. Purnel* (k). But supposing the calling upon the defendant to be a virtual calling upon the impressed man, still it is not well alleged; for the replication should have been, that the plaintiff called upon the impressed man; and upon an issue taken on that allegation, the calling upon the defendant would have been evidence.

Upon the demurrer to the second plea, it is said, that nothing can be averred against a specialty to contradict it; that the defendant himself was under no restraint, and that duress therefore is no plea, according to *Huscombe v. Standing* (l). In the present case, however, it appears upon the pleadings that the condition is illegal; for it is either that the man shall deliver himself up to an illegal imprisonment, or, supposing the imprisonment legal, then the bond was given for procuring the enlargement of the man from a legal custody, and is therefore bad. *Collins v. Blantern* has overruled *Downing v. Chapman*. [BULLER, Justice.—It is strange that it should have that effect, when the Judges profess to retain their former opinion]. Whenever the bond has the effect of bringing about an illegal purpose, that purpose may be shown in pleading, and will vacate the bond.

Wood, in reply.—If the condition of this bond can be construed in two modes, the one making it legal and the other illegal, the Court will adopt that interpretation which supports its legality. It is not illegal to entrust an impressed man to another person for a time. It is not a release and discharge of the man; it is merely humanity to the man and to his master. The stipulation in the condition is, that the man shall return to his service, a stipulation perfectly legal. *Collins v. Blantern*, relied upon by

(k) B. R., M. 8 Car. 1, (l) B. R., T. 5 Jac. 1, Cro.  
5 Vin. Ab. 207. Jac. 187.

the other side, admits the authority of *Downing v. Chapman*.

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LORD MANSFIELD.—The demurrer to the replication to the first plea turns upon the point, whether the impressed man has been required to return. The matter brought before the Court by the replication is, that the defendant was required to procure the man to appear. This is a case of forfeiture, and must be construed strictly. The condition is, that the defendant shall procure the man to appear whenever he shall be called upon. There must, therefore, be two notices: first, the impressed man must be required, and then the defendant must be required to procure him. I think this demurrer right.

The second point is of more consequence. Some perplexity exists as to averring against a condition; but there cannot be such an absurdity as that a man should have a legal defence and should not be able to show it. Whatever is a defence at law may be pleaded against a bond, and whatever would be a defence in equity is a defence at law. It is not inconsistent with the bond. It only states that the bond was made under circumstances which render it void. The doctrine is simply this: you shall not by parol evidence impeach the written agreement on account of the danger of perjury. But when the agreement is admitted, you may show other circumstances which make it illegal, but do not contradict the bond. Here the defendant says, "I signed the bond because the man was illegally impressed." *Impressed* does not mean *legally* impressed. Consistently, therefore, with the condition of the bond, the defendant may say that the man was illegally impressed. The bond, on the face of it, is almost illegal. How dare an officer, when a man is impressed, let him go? How can he know when his services will be wanted? It is like a sheriff letting a prisoner go. The demurrer admits the second plea to be true, and that plea is a good plea.

BULLER, *Justice*.—With regard to the demurrer to the replication to the first plea, I think the observations of Mr. *Law* are incorrect. I think it right to state the demand as it was, and not to let it go to trial on a general demand on the impressed man, when the facts may be stated so as to take the opinion of the Court on demurrer, whether they in law amount to the demand required by the bond.

LORD MANSFIELD directed the defendant's attorney to

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inform the Lords of the *Admiralty* that this cause had been before the Court.

Judgment for the defendant (m).

(m) This case was recognised in *Paxton v. Popham, B. R.*, *E. 48 Geo. 3, 9 East, 408*. So in *Doe dem. Small v. Allen, B. R.*, *H. 39 Geo. 3, 8 T. R. 147*, it was held, that parol evidence might be given of questions asked by the testator at the time of executing his will, for the purpose of setting aside the will on the ground of fraud. "It is a rule of law, that no one can avoid a bond by averring a delivery thereof upon condition, unless he can show a writing of the condition; for he is charged by a sufficient writing, so he must be discharged by a sufficient writing, or by some other

thing of as high authority as the obligation. For the same reason the defendant cannot aver the condition to be different from what is expressed in writing; but any averment consistent with the condition, which shows the condition against law, will be admitted. Therefore where the consideration on which the bond is given is illegal, the defendant may take advantage of it by pleading as simony, usury, compounding of felony, &c., and this notwithstanding there be a different and legal consideration recited in the bond." *Bul. N. P. 173.*

Friday,  
10th May.

Where bail apply to enter an exoneretur on the bail piece, if fraud is imputed to the bankrupt in obtaining the commission and certificate, and the trading be disputed, the Court will direct an issue to try whether the commission duly issued.

WILLISON v. SMITH (a).

**R**ULE to show cause why an exoneretur should not be entered on the bail piece, on the ground that the defendant had become a bankrupt, and obtained his certificate pending the suit.

*Wallace* showed cause on an affidavit imputing fraud to the defendant in obtaining the commission and certificate, and stating that the defendant had his furniture given him by his assignees, to the value of £4000, and his wife's jewels, to the amount of £7000; and also stating the defendant had never traded to *England*, having only remitted his money in diamonds. He offered to try an issue whether the certificate was fraudulent or not.

*Lee, S. G., Baldwin, and Erskine, contra.*—The certificate is made conclusive evidence of the trading and bankruptcy, and the Court cannot go into the question now. *5 Geo. 2, c. 30, s. 7. 13.* The plaintiff might have opposed the certificate, or have petitioned to supersede the

(a) *S. C.* cited *Tidd's Pr.* 211, 8th edit.

commission. The bail cannot now render, and therefore an *exoneretur* is of course.

The Court directed an issue, to try "whether the commission duly issued," in which the bail were to be plaintiffs. The issue at first intended was, "bankrupt or not," but a doubt arose whether that would include the question of the petitioning creditor's debt. BULLER, J., said, that on such an issue, on the last circuit, he held the plaintiff to proof of the petitioning creditor's debt; and Lord MANSFIELD seemed to be of the same opinion. No proceedings were to be had in the mean time against the bail, or to fix them (b).

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(b) See *Yeo v. Allen*, B. R., H. 23 G. 3. *post*, and the note there.

YOUNG v. JONES.

Saturday,  
11th May.

**D**EBT on bond.—*Oyer* of condition, which was to pay the plaintiff an annuity of £58 per annum for his life. Plea, That the bond was given in pursuance of a corrupt agreement to resign the living of *Bradwell*, and therefore simoniacal and void. Replication, traversing the simoniacal contract. At the trial a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

One *Stradling* having purchased the advowson *in fee*, and having a son at college intended for orders, proposed to the plaintiff, the incumbent, to resign the benefice on an annuity being secured him of equal value to the clear profits of the benefice, in order that another person might be presented, who should execute a general bond of resignation, so as to make way for the son when in orders, and of age to accept of the benefice. The bond in question was accordingly given by *Stradling*, the father, the defendant and another person as co-obligors; and the plaintiff resigned the benefice.

A bond given to an incumbent, securing him an annuity of equal value with the profits of the benefice upon his resignation, in order that another person may be presented, who may give a general bond of resignation, so that the patron's son, when of proper age, may be presented, is a bond within 31 *Eliz.* c. 6, s. 8, and void.

*Erskine*, for the plaintiff.—There are two questions in this case: 1. Whether the transaction be simony within the statute 31 *Eliz.* c. 6. s. 8? and 2. Whether, if it be within the statute, the bond itself is void?

1. The object of the statute of *Eliz.* is, to put an end to

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corrupt agreements between patrons and clergymen to present improper persons; and therefore it punishes the patron and the clerk. The fifth section covers every transaction that can arise between the patron and the clerk, who are all through the statute considered as *in pari delicto*. The next section (6) is pointed against corrupt agreements between bishops and clerks. By the eighth section, if any incumbent shall corruptly resign the same, &c. for any pension or sum of money, he shall lose double the value of the sum. The meaning of this section is, that if the incumbent corruptly resigns, so as to enable the patron to sell the living, he shall be considered as *particeps criminis*. In order to prove the plaintiff guilty of simony, it must be shown that *Stradling* has also been guilty of it. Now, suppose that at the time of the purchase of the advowson the living had been vacant, and *Stradling* had presented the plaintiff on receiving a general bond of resignation from him, in order that he might afterwards present his son, such a bond would have been good (a), and there would have been no simony on either side. Suppose, again, that the living had not been void, but full of the plaintiff, and the plaintiff had said, "Whenever you please I'll resign for your son, or give you now a general bond of resignation," this would have been no simony; there would have been no advantage in this either to the patron or the incumbent. Here the patron derives no benefit, but, on the contrary, is a loser by the amount of the annuity. The statute does not say generally, "if the incumbent shall resign for money," but if he shall *corruptly* resign; and this is not a corrupt resignation, as it would have been had it been made for the purpose of a sale by *Stradling*, the father. Simony is a corrupt contract in favour of the patron. *Johns v. Lawrence* (b). Had *Stradling*, the son, made this contract with the plaintiff, that the latter should resign in his favour, it would then have been simony; and so it would have been had *Stradling*, the father, made this contract in order that he might present a stranger; but a father may provide for his son. *Johns v. Lawrence* (b). Suppose the incumbent an old man, unable to perform the duties of his office, may he not

(a) Sed vide *Bishop of London v. Fytche*, 1 East, 486; 96. and post. (b) *B. R.*, T. 8 Jac. 1, Cro. 1 Br. P. C. 211; 1 Br. C. C. Jac. 248.

resign? and may not the patron give him an annuity sufficient to live on?

The second question is, Whether, supposing the transaction be simoniacal, the bond is void? [Lord MANSFIELD.—The rule of law, independently of the statute, is, that if the bond is corrupt the plaintiff cannot sue.] *Ers-  
kine* did not press this part of his argument farther.

*Lawrence, contra.*—The last ground being abandoned, it is unnecessary to make any observations upon it. The only question then is, Whether this contract be simoniacal? The position contended for on the other side, that to constitute simony the patron must receive some benefit, is unfounded. *King v. Trussel*(c). The rule is, that no money shall be given for ecclesiastical benefices, and there is no exception to this rule. The object of the statute of *Elizabeth* was to prevent benefices from being transferred for pecuniary considerations. Whenever the consideration is pecuniary, the resignation is corrupt. The purchase of a presentation, while the church is vacant, is clearly unlawful(d); and this transaction is, in effect, the same thing accomplished by circuitry.

But it is said that this being a transaction by a father for the benefit of his son is not corrupt. There is no such exception in the statute; and the case in *Croke, James*, cited on the other side, is single in laying down that doctrine. A father is not to provide for his son by illegal means.

The Court having expressed a wish to have the case argued again, it was argued in this term by *Cowper* for the plaintiff, and by *Wilson* for the defendant.

*Cowper*, for the plaintiff.—Two points may be made for the plaintiff: First, That this is not a bond within the statute 31 *Eliz. c. 6*; and secondly, that if within the statute, the bond is not made void, but the parties are liable to penalties. [Lord MANSFIELD said, that it was quite settled that upon any prohibited act the plaintiff could not recover; and BULLER, J., added, that there was a case in which Lord HOLT expressly mentioned simony.] But if the transaction does not come within the act, it will not be necessary to argue this point. No case has occurred in which it has been determined what is a corrupt resignation

(c) *B. R., E. 19 Car. 2, v. Woforstan, B. R., T. 4 G. 1 Sid. 329.*

3, 3 *Burr.* 1504.

(d) See *Bishop of Lincoln*

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within the statute 31 *Elix. c. 6. s. 8.* If the word "corrupt" has any meaning, it follows that there may be resignations which are not corrupt. In section five, making void presentations for money, &c. the word *corrupt* is not used as in section eight, but the corruption is deduced as an inference, "the person so *corruptly* taking," &c. The proper test in this case is to see whether there be simony in the patron or person making presentation. If there be not, the resignation will be good. There is no pretence here for saying that this would be simony in the father. It does not appear that there was any agreement as to the presentation at the time of the purchase of the advowson. In *Barret v. Glubb (c)*, simony is defined to be "a corrupt agreement to present." Where is the corrupt agreement here, which makes it simony in the father? and, unless it be simony in him, how can the resignation be corrupt? If this resignation be corrupt, no resignation for reward can be good. Suppose that, the incumbent being unable to do duty, the patron, to provide for the service of the church, gives him an annuity to resign, would that be a corrupt resignation?

*Wilson, contra.*—In order to render a resignation corrupt, the illegal act must be done by the parson. It is his motive that is to be inquired into. It is true that here there is nothing to show that he was acquainted with the purpose of the patron. He only meant to retain the salary without doing the duty. No infirmity appears, which might be a meritorious cause for the annuity, so as to take the case out of the statute. It is not necessary, in order to bring the parson within the eighth section, that there should be simony in the patron, which is a distinct offence, provided for by another clause of the act. But it is said that this is not simony, because it is a father providing for his son. Though the son was of age long since, he has not yet been presented. [Lord MANSFIELD.—Is there any case where money will not avoid a resignation? If not, will not any benefit operate in the same manner, and might not taking a better living make it bad? The difficulty with me is to draw the line.—We will think of the case.]

*Cur. adv. vult.*

Lord MANSFIELD now delivered the judgment of the Court.—As between the plaintiff and defendant, this is a

most unjust case; but we must decide as a question of law; and if the bond is illegal, the plaintiff cannot recover. The question turns upon the construction of the statute 31 *Eliz.* c. 6. s. 8. We have had some difference of opinion: I inclined to think that the word *corrupt*, in the eighth section of the statute, was an emphatic word, and that if the presentation was pure, the resignation was not corrupt; but the rest of the Court are of a different opinion, and think every resignation for money is corrupt. This resignation was certainly for money, and therefore there must be

Judgment for the defendant (*f*).

(*f*) See *Fletcher v. Lord T.*; and *Statutes* 7 & 8 *G. 4*, *Sondes, Dom. Proc.* 1826, 3 c. 25; 9 *G. 4*, c. 94. *Bingh.* 502; 1 *Bligh*, 144, *N.*

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HERBERT v. COOK (*a*).

Saturday,  
11th May.

THIS was an action of debt on a judgment. The declaration was as follows:—"Gloucestershire, to wit. *Henry Herbert* complains of *John Cook* being in the custody, &c. of a plea that he render to the said *Henry* £6, 15s. 4d. of, &c. which he owes to and unjustly detains from him, &c. For that whereas the said *Henry* heretofore, to wit, at the court of the hundred and castle of *St. Briavell's*, in the county of *Gloucester* aforesaid, held at the castle of *St. Briavell's*, in and for the said castle and hundred, and within the jurisdiction of the said court, on *Monday*, the 10th of *July*, 1780, before *W. Court*, *W. Fryer*, and *T. Allen*, then free suitors there, according to the custom of the said court from time immemorial, used and approved of within the said court, came in his proper person, and then and there in the same court levied his plaint against the said *John* in a certain plea of trespass on the case, to the damage of the said *Henry* of 39s. for a cause of action arising and accruing to the said *Henry* within the jurisdiction of that court; and such proceedings were thereupon had in that court, that afterwards, to wit, at, &c. held, &c. in and for, &c. and within the jurisdiction of the said court, on, &c. before, &c. free suitors, &c., he, the said *Henry*, by the consideration and judgment of the said court, recovered

Debt on the judgment of the hundred court of *St. Briavell's*. Plea, that the cause of action did not arise within the jurisdiction of the inferior court, on demurrer held good.

(*a*) *S. C.* shortly reported *Willes*, 37 (*n*).

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against the said *John*, in the said plea, £3, 7s. 8d. for his damages, which he had sustained as well on the occasion of his not performing certain promises and undertakings, then lately made by the said *John* to the said *Henry*, within the jurisdiction of the said court, as for his costs and charges by him laid out about his suit in that behalf, whereof the said *John* was convicted, as by the memorandums and proceedings thereof, now remaining in the said court, more fully appears; which said judgment still remains in the said court there in full force and effect, not annulled, reversed, set aside, paid off, satisfied, or discharged; and the said *Henry* hath not yet obtained any execution of the said judgment, whereby an action hath accrued to the said *Henry* to demand and have of and from the said *John* the said £3, 7s. 8d. parcel of the said £6, 15s. 4d. above demanded."

There was another count, precisely similar, only calling the inferior court *the hundred court of St. Briavell's*.

The defendant pleaded, 1. *Nil debet*, on which issue was joined. 2. That the said *Henry* ought not to have, &c. because he saith that the said judgment and recovery, in the first count of the said declaration mentioned, and the said judgment and recovery in the said last count of the said declaration mentioned, are one and the same judgment and recovery, and not other or different; and the said *John* saith, that he cannot deny but that the said judgment and recovery, in the said first count of the said declaration mentioned, was given and had against him the said *John*; but the said *John* further saith, that the cause of action of the said *Henry* (if any) against the said *John*, for which the said *Henry* levied his said plaint in the said court of the castle and hundred of *St. Briavell's*; and whereupon the said proceedings, judgment, and recovery were afterwards had and given, as in the first count of the said declaration mentioned, arose and accrued to the said *Henry*, at *Ross*, in the county of *Hereford*, out of the jurisdiction of the said court of the castle and hundred of *St. Briavell's*, and did not arise and accrue to the said *Henry* at the castle of *St. Briavell's* aforesaid, or elsewhere within the jurisdiction of the said court of the castle and hundred of *St. Briavell's*.  
Verification.

To the latter plea the plaintiff demurred generally.

The demurrer was argued in *Hilary Term* by *Lane* for the defendant, and by *Baldwin* for the plaintiff.

*Lane*.—The demurrer admits that the cause of action did

arise out of the jurisdiction of the court of *St. Briavell's*, and the plaintiff has therefore shown himself to be out of court. This is a jurisdiction exclusive of the king's courts, and is to be construed strictly. The statute of *Westminster*, 3 *Ed.* 1, prohibits inferior courts from proceeding out of their jurisdiction, and the authorities show, that where an inferior court exceeds its jurisdiction, it is a trespass to act under its judgment. Some of the authorities say that the judgment may be avoided by plea. *Br. Ab. Assize*, 22, *Tresp.* 238, *Act. sur le stat.* 49. *Year Book*, 10 *H.* 6, 13. 19 *Ed.* 4. *The case of the Marshalsea* (b), *Randal's case* (c), *Higginson v. Martin* (d), *Anon.* (e), *Gold v. Strode* (f), *Perkin v. Proctor* (g), *Gwinne v. Poole* (h). The plaintiff might have replied, that the defendant had appeared and admitted the jurisdiction.

*Baldwin, contra.*—In the declaration below it is stated that the cause of action arose within the jurisdiction, and it was therefore the duty of the defendant, if he objected that the court of *St. Briavell's* had no jurisdiction, to take advantage of that objection in the suit there. This appears from *Gwinne v. Poole*. So in *Lucking v. Denning* (i) it is laid down, that if a matter arise, *extra jurisdictionem*, and the plaintiff declares of it as *infra jurisdictionem*, the defendant may plead to the jurisdiction of the court, and if that be overruled, may have a prohibition, on the statute of *Westminster*; but if he waives that, and pleads to the merits, he can never have a prohibition, nor can he take advantage of the want of jurisdiction; for by the averment of the count, and by his own admission, he is estopped to say that it was a matter that arose out of their jurisdiction. Unless the cause of action had been averred to have been within the jurisdiction, the defendant might have brought error. *Quarles v. Searle* (k).

LORD MANSFIELD.—It seems to me to be a settled point in *Gwinne v. Poole* and *Lucking v. Denning*. The di-

- (b) *B. R.*, *M.* 10 *Jac.* 1, *Carth.* 148.  
 10 *Rep.* 68 b. (g) *C. B.*, *T.* 8 *Geo.* 3, ' 1  
 (c) *C. B.*, *T.* 30 *Car.* 2, 2 *Wils.* 382.  
 2 *Mod.* 308. (h) *B. R.*, *M.* 4 *W. & M.*,  
 (d) *C. B.*, *H.* 28 & 29 *Car.* 2 *Lutw.* 1568.  
 2, 2 *Mod.* 195. (i) *B. R.*, *T.* 1 *Anne*, 1 *Salk.*  
 (e) *C. B.*, *E.* 2 *W. & M.*, 201.  
 2 *Vent.* 171. (k) *B. R.*, *M.* 3 *Jac.* 1, *Cro.*  
 (f) *B. R.*, *T.* 2 *W. & M.*, *Jac.* 95.

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stinction is this: where the objection is on the face of the declaration, nothing can cure it; but where it appears regular on the face of the proceedings, it is otherwise.

ASHURST, *Justice*.—Where the objection arises in point of locality, it is necessary to take advantage of it by plea to the jurisdiction. There must be

Judgment for the plaintiff.

A few days afterwards, in the course of the same term, the Court said that they were not satisfied with this judgment, and directed a second argument. The case was therefore again argued in this term by *Baldwin* and *Lane*.

*Baldwin*, for the plaintiff.—The question is, whether the defendant, in an action upon a judgment obtained in an inferior court, can put in issue a fact upon which he might have taken issue below. If this be permitted, great inconvenience will follow. Supposing that, instead of bringing an action on the judgment, the plaintiff sues out execution, it would be ground for an action of trespass. Litigation and expense would be increased, and the inferior jurisdictions would become useless. The invariable rule is, that these objections shall be taken in the first instance. There are many decisions in the books on the point: the latest is that of *Rowland v. Veale* (l). It is there laid down by Lord MANSFIELD, in delivering the judgment of the Court, that if the cause of action does not arise within the jurisdiction, the defendant should avail himself of it by plea in the court below. A prohibition lies where the defendant is prevented by artifice from pleading to the jurisdiction, or if his plea be overruled. *Mendike v. Stint* (m). If the want of jurisdiction appears on the record it is matter of error, *Quarles v. Scarle* (n); but if the jurisdiction is stated, and the party imparles, or pleads another plea, he cannot afterwards take advantage of this objection. *Lucking v. Denning* (o), *Wageman v. Smith* (p). In *Higginson v. Martin* (q) the Court was equally divided. [BULLER, J.—Judgment was in that

(l) *B. R.*, *H.* 14 *Geo.* 3, *Cowp.* 20. (o) *B. R.*, *T.* 1 *Anne*, 1 *Salk.* 201.

(m) *C. B.*, *M.* 29 *Car.* 2, *1 Mod.* 272; 1 *Freeman*, 294, *S. C.* (p) *B. R.*, *T.* 22 *Car.* 2, *1 Mod.* 63.

(q) *C. B.*, *H.* 28 & 29 *Car.* 2, *2 Mod.* 195; *S. C.* 1 *Freeman*, 322.

case given for the plaintiff by all the Judges. *Wyndham* gave an opinion differing from that which he had given two terms before. I state the case from Sir *Edward Northey's* note (r).] Lastly, *Gwinne v. Poole* and *Rowland v. Veale* are both in point for the plaintiff.

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*Lane, contra.*—The Court directed a second argument, on the ground that, though the officer might be excused where the want of jurisdiction does not appear on the face of the proceedings, yet that it is otherwise with regard to the party himself, who must know the want of jurisdiction. The demurrer in this case admits that the cause of action did not arise within the jurisdiction; but it is objected that the defendant ought to have pleaded the want of jurisdiction below, and that he cannot now take advantage of it.

There are three kinds of inferior jurisdictions: 1. Those that are limited as to the subject matter; 2. Those limited as to persons; 3. Those limited as to place. In the first, if the subject matter was out of the jurisdiction, all the parties concerned are trespassers (s); in the second and third, all are trespassers unless the jurisdiction is stated on the face of the proceedings, when the officer is excused, but the party himself is still liable as a trespasser. If he be liable as a trespasser, it is obvious that the defendant is not concluded, by his omission to take issue on the jurisdiction in the court below. There are numerous authorities to show the party a trespasser. *Br. Ab. Action sur le statute*, 49. 35. *Id. Judgment*, 123. 19. *The case of the Marshalsea* (t), in which it was held that trespass lay against

(r) There is great contradiction in the reports of this case. In the report in 2 *Mod.* the Chief Justice and *Wyndham* are made to say, "the plaintiff may allege the cause of action to arise out of the jurisdiction; and as to his being estopped, by admitting of the jurisdiction below, that cannot be, because an admittance cannot give a court jurisdiction where it had none originally;" while in *Mendyke v. Stint*, 2 *Mod.* 273, the same Judges say, that "after the defendant has admitted the jurisdiction,

by pleading to the action, especially if verdict and judgment pass, the Court will not examine whether the cause of action did arise out of the jurisdiction or not." See further upon this point, 1 *Freeman*, 323 (n), 2d ed.; *R. v. Commissioners of Sewers*, *B. R.*, *M.* 46 *Geo.* 3, 7 *East*, 80; *Green v. Rutherford*, 1 *Ves. sen.* 471.

(s) See *Buller's Nisi Prius*, 83.

(t) *B. R.*, *M.* 10 *Jac.* 1, 10 *Rep.* 68 b.

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both the officer and the party—a very hard case. *Weaver v. Clifford* (u), *Hodson v. Cook* (x).

In *Higginson v. Martin* (y), it is said by *North*, C. J., and *Wyndham*, J., on the authority of *Squib's* case (z), that he who sues in an inferior court is bound, at his peril, to take notice of the bounds and limits of that jurisdiction; and if the party, after a verdict below, prays a prohibition, and alleges that the court had no jurisdiction, a prohibition shall be granted; and it is no estoppel that he did not take advantage of it before (a). In *Higginson v. Martin*, as reported in *Buller's Nisi Prius* (b), it is said that the plaintiff below ought to know the extent of the jurisdiction to which he applies for justice, and therefore if, in an action for false imprisonment, he justifies under the process of an inferior court, the plaintiff above might reply, that the cause of action arose out of the jurisdiction of the court; and a rejoinder, praying judgment, if the plaintiff, having, by his pleading in the inferior court, admitted the jurisdiction there, shall now be admitted to deny it here, would not be good.

It is said that the defendant below admitted the jurisdiction by his plea, but that does not appear by the present record. If it was so, the fact ought to have been replied by the plaintiff.

In *Rowland v. Veale* the Court went on a presumption in favour of the jurisdiction; but such a presumption is excluded here, since the plaintiff by his demurrer has admitted the want of jurisdiction. In *Gwinne v. Poole*, the plaintiff was an administrator, and peradventure, in the language of *Powell*, B., he might not know that the cause of action arose out of the jurisdiction.

*Cur. adv. vult.*

Lord MANSFIELD now delivered the judgment of the Court.—Upon looking into the record, there is no question at all. A wide argument has been gone into as to how far an officer may be justified, and how far a party is concluded

(u) *B. R., E. 44 Eliz., 2 Bulstr. 62.*

(x) *B. R., M. 35 Car. 2, 1 Vent. 369.*

(y) *C. B., H. 28 & 29 Car. 2, 2 Mod. 197. vide ante, p. 104.*

(z) *C. B., E. 27 Car. 2, 2 Mod. 27; 1 Freeman, 193, S. C.*

(a) See *Blacquiere v. Hawkins*, *ante*, vol. i. p. 378.

(b) *P. 83.*

from contesting the jurisdiction; but there is no room for that argument. This is an action brought on a judgment of the hundred court of *St. Briavell's*, in the county of *Gloucester*, held in and for the said hundred, for a cause of action arising within the jurisdiction; so that the plaintiff takes upon himself to state in his declaration that the cause of action arose within the jurisdiction. If denied, that fact must have been proved. To the action on the judgment, the defendant has pleaded that the cause of action did not arise within the jurisdiction, and to that plea the plaintiff has demurred; therefore the plaintiff has admitted that it was *not* within the jurisdiction. Besides, the judgment is not the judgment of a court of record, and being therefore only evidence, like a foreign judgment, the whole is open.

Judgment for the defendant (c).

(c) Upon this case Sir *W. D. Evans*, in the notes to his translation of *Pothier on Obligations*, has made the following observations: "In *Herbert v. Cook* a plea to a declaration in debt on the judgment of an inferior court, not of record, that the cause of action arose without the jurisdiction of the inferior court was, upon demurrer, adjudged to be good. Lord MANSFIELD said, that the argument how far the party was precluded after judgment from alleging that the cause of action arose out of the jurisdiction, was not applicable, for the demurrer admitted the fact; so that it appeared on the record that there was no cause of action within the jurisdiction. But, with deference, I should conceive, that if the defendant was precluded from alleging that the cause of action did not arise within the jurisdiction, his actually making such an allegation could not reasonably be supported, and therefore that the fictitious admission of the truth of a plea, which arises from denying its sufficiency, did not warrant

getting rid, by a side wind, of the principal question, whether a new, perfect, and indefeasible cause of action, independent of all question respecting the rectitude of the original judgment, did not arise, by virtue of the judgment itself. In *Galbraith v. Neville*, mentioned in a note to the third edition of *Douglas*, (see *ante*, vol. i. p. 5 (n)), Lord KENYON expressed strong doubts respecting the doctrine advanced in *Walker v. Whitter* (*ante*, vol. i. p. 1), which was maintained on the other hand by Mr. Justice BULLER. I conceive that there is no other instance in which it has been judicially decided that the judgment of a court not of record, or of a foreign court, was not conclusive with respect to the point decided, so far as the suit contained proper parties and incidents to have given it a conclusive effect, if that court had been of record; and many cases which have been decided respecting prize causes are directly in support of the opposite proposition." See also *Gahan v. Maingay*, cited *id.* vol. ii. p. 307.

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The doctrine of Lord MANSFIELD, that the judgment of an inferior court not of record, and of a foreign court, is not conclusive, has been frequently recognised. See *Sinclair v. Faser*, *ante*, vol. i. p. 4, 20 *St. Tr.* 469, *S. C.*; *Arnott v. Redfern*, *C. B.*, *H.* 6 & 7 *G.* 4, 3 *Bingh.* 357; *Husham v. Smith*, 2 *Campb. N. P. C.* 19; *Barnes v. Winkler*, 2 *C. & P. N. P. C.* 345. It is very difficult to discover the grounds upon which these cases proceed. While the sentence of a foreign court of admiralty, a sentence of expulsion or deprivation of a member of a college, and a conviction by a justice of the peace, are regarded as conclusive, the judg-

ment of an inferior court of competent jurisdiction may be examined, and all the grounds upon which it has proceeded once more inquired into. It does not appear that this doctrine has an earlier origin than the time of Lord MANSFIELD, and although it has been frequently incidentally recognised, it has never been solemnly adjudged to be law.

The question as to the conclusiveness of a foreign judgment arose, but was not decided, in *Plummer v. Woodburne*, *B. R.*, *T.* 6 *Geo.* 4, 4 *B. & C.* 625, 7 *D. & R.* 25, *S. C.*; see also *Briscoe v. Stephens*, *C. B.*, *T.* 5 *Geo.* 4, 2 *Bingh.* 216.

Saturday,  
 11th May.

ASTLE v. GRANT.

(*Reported, ante*, vol. ii. p. 731, n. (4).)

# C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE

TWENTY-SECOND YEAR OF THE REIGN OF GEORGE III.

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RANN, Clerk, v. PECKER and Another.

(*Reported, Caldecott, 196.*)

1782.

Friday,  
7th June.

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COCKEREL v. ALLANSON (a).

Saturday,  
15th June.

THIS was an action of trespass for breaking and entering the plaintiff's close. The defendant pleaded the general issue, and, in justification, a plea of right of way, in which the width of the way was set out (b). The plaintiff new-assigned *extra viam*, and the defendant pleaded *not guilty* to the new-assignment. On that issue there was a verdict for the plaintiff, with thirty shillings damages. The master defendant pleaded not guilty; on a verdict for the plaintiff, on the new assignment, with 30s. damages, it was held that he was not entitled to his full costs.

Where, in trespass *quare clausum fregit*, the defendant pleaded a right of way, setting out the breadth of the way, and the plaintiff new assigned, to which the de-

(a) *S. C. Hullock on Costs*, after, a road or way for cattle, carts, and carriages, of the vol. i. p. 77, 2d ed.

(b) It was a way awarded by certain commissioners, and the plea stated that "they did thereby order, &c. that there should be, at all times there- breadth of twenty feet, as the same was then staked, ditched, or bounded out," &c. *Hullock on Costs*, 77.

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having taxed full costs, notwithstanding the statute 22 and 23 Car. 2, c. 9, *Arden* obtained a rule to show cause why the master should not review his taxation.

*Lee, S. G.*, and *Chambre*, showed cause.—The defendant, by pleading a right of way, has placed a justification on record, and the plaintiff is therefore entitled to his full costs. *Asser v. Finch* (c), *Beale v. Moore* (d). The freehold here might come in question, for though the width of the way is set out, the length is not. By putting this justification on the record, a great additional expense has been imposed on the plaintiff.

*Arden* and *Wood, contra*.—The question is, whether a man who is guilty of an involuntary trespass in a close, in which he happens to have a right of way, shall be saddled with full costs? He is compelled to plead his right of way, otherwise the plaintiff might give in evidence every cart and carriage which he has driven over the road. The plaintiff cannot therefore complain of the justification, as he might have described the place where the trespass was actually committed; in which case the defendant might safely have pleaded not guilty. The statute was passed to prevent frivolous actions of trespass. Suppose two persons are found trespassing over the plaintiff's close; that one of them has a right of way, and the other not; that the one justifies, to which there is a new assignment, and the other pleads not guilty; and that there is a verdict against both, and a shilling damages; in this case, the party who had a right of way must pay costs, while he who had no right of way will pay none.

In *Asser v. Finch*, the bounds of the way came in question; but here the extent of the way is admitted by the pleadings. The new assignment admits the description as stated in the plea, viz. a way for cattle, carts, &c. of the breadth of twenty feet, as the same was then staked, ditched, or bounded out, lying in the said place, called the *Crofts*, leading from a certain public highway, &c. in the said award before mentioned, into, through, and over the said place in which, &c.

Lord MANSFIELD.—This question arises on the statute for preventing frivolous suits. Whenever there is a new

(c) *B. R., M. 30 Car. 2, 2*  
*Lea. 234.*

(d) *B. R., T. 15 G. 2, 2 Str.*  
*1168.*

assignment there is a new action, and this appears to me to be equivalent to not guilty to the declaration, and nothing else. Does the freehold come at all in question? The defendant has a right of way—the declaration forces him to plead it. He does so with absolute certainty. The plaintiff replies a trespass *extra viam*; he says, I do not mean any trespass in the way; and, in truth, there was no question about it. It is therefore a general action of trespass, and the case in *Levinx* admits that it would be so if the road were agreed.

BULLER, *Justice*.—I think the case in *Levinx* went on a wrong ground, for it is not sufficient to say that the freehold *might* come in question; the statute requires that it *should* come in question; and then the judge may certify. The plain meaning of the legislature is, that it should come in question. The freehold here could not, or at least did not, come in question.

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Rule absolute (c).

(c) In *Buller's N. P.* 330, there is the following note of this case: "Adjudged, that where the defendant justified for a right of way, and the plaintiff replied *extra viam*, and the defendant pleaded *not guilty*, the plaintiff should have no more costs than damages, unless the Judge certified, for the title does not come necessarily in question. It may, or it may not; and if it does, the Judge ought to certify." "Whence," adds Mr. Baron HULLOCK (*on Costs*, vol. i. p. 79 (n)), "it should seem to have been the opinion of Mr. Justice BULLER, that the principle which governed the decision in *Cockerel v. Allanson*, extends to deprive a plaintiff of full costs, without a certificate, in cases where a right of way is generally pleaded, as in 2 *Lev.* 234, and a replication of *extra viam*, and not guilty thereto." The language of Mr. Justice BULLER, as given in the text, justifies this conjecture; but the opinion ex-

pressed by him cannot now be considered as law. The case of *Asser v. Finch* has been, on several occasions, recognized and acted upon. *Martin v. Vallance*, B. R., E. 41 G. 3, 1 East, 350; *Taylor v. Nicholls*, B. R., H. 60 G. 3, 3 B. & A. 443.

Were the question to be argued independently of the latter authorities, it might well be contended that there is no substantial distinction between *Asser v. Finch* and the principal case, and that, according to the opinion of Mr. Justice BULLER, the plaintiff, in both cases, recovering less than 40*s.* damages, on the new assignment, comes within the statute 22 & 23 Car. 2, c. 9, and is entitled to no more costs than damages. The reason why, in case of a special plea being pleaded, the statute has been held not to apply, is, because it must appear either that the freehold did come in question—in which event a Judge's certificate is unnecessary, since he would be called upon to cer-

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tify what is apparent upon the record—or that it could not, on the pleadings, be brought in question, which is a case to which the statute is not intended to apply. *Martin v. Vallance*, and *Taylor v. Nicholls*, do not appear to come within this reasoning. A right of way was pleaded generally, and not by metes and bounds; and the plaintiff new assigned, to which the defendant pleaded not guilty; and on this issue there was a verdict for the plaintiff for less than 40s. damages. The question to be considered then is, whether, under these pleadings, the freehold could come in question, and whether it will appear on the whole record that it came in question or not? It has been said, that “if the special plea be not traversed, or if traversed and found for the defendant, yet if the plaintiff new assign, and the defendant plead not guilty to the new assignment, and it be found against him, no certificate is necessary; for though the right as claimed by the plea be determined in favour of the defendant, yet the applicability of that right to the trespass complained of is put in issue by the new assignment and plea thereto; and therefore it appears by the whole record, whether the freehold came in question or not.” 1 *Saund.* 300 (n), 5th ed. To this it may be replied, that the applicability of the right claimed by the plea to *all the trespasses* complained of, is not put in issue by the new assignment and plea thereto, and that therefore it cannot appear by the whole record whether the freehold came in question or not. For example: The plaintiff declares for breaking and entering his close, called *A*; the defendant pleads generally a right of

way over *A*, without setting out the metes and bounds; the plaintiff traverses the right of way, and new assigns *extra viam*, to which the defendant pleads not guilty. The plaintiff here says, “You have not the right of way which you claim over *A*; and if you have, yet you have committed other trespasses in *A*, which you have not justified.” In new assigning he waives altogether the consideration of the trespasses affected to be justified, and asserts that the matter of the special plea has no application whatever to the trespasses of which he complains in his new assignment. In evidence he proves other trespasses than those covered by the special plea; and the defendant may meet that evidence by showing that the alleged acts of trespass proved under the new assignment were committed on his own soil and freehold. The soil and freehold thus come directly in question, and the jury find that they are the soil and freehold of the plaintiff; but of this no trace is to be found on the record. It neither appears that it *did* come in question, nor that it *did not* come in question. Is it not then a case strictly within the statute, a case in which it is possible for the freehold to come in question, and where it does not appear either upon the record or by the certificate of the Judge that it did, or did not come in question?

This view of the authorities is strengthened by what fell from MANSFIELD, C. J., in *Gregory v. Ormerod*, C. B., T. 51 G. 3, 4 *Taunt.* 100. “This is totally distinguishable from *Martin v. Vallance*, and it is not wonderful that BULLER, J., should have expressed dissatisfaction at those cases, for it is a

monstrous thing, that when a plaintiff has been wholly in the wrong for bringing an action for a trespass which is justified by a right of way, or other right, he therefore shall have full costs because he brings another action for another little trifling trespass which he may happen to be able to prove."

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 v.  
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MEDCALF v. HALL.

THIS was an action for goods sold and delivered, tried before Lord MANSFIELD, at *Guildhall*, on the 29th of *May*. The defence was, that the defendant had delivered to the plaintiff a draft on *Brown, Collinson, and Tritton*, which the plaintiff had made his own by negligence. It appeared that the draft was delivered by the defendant to the plaintiff about one o'clock in the afternoon, at *London Wall*; that the house of *Brown, Collinson, and Tritton* was in *Lombard Street*, about half a mile distant from *London Wall*; that *Brown, Collinson, and Tritton* were used to pay bills till five o'clock, and that they paid, as usual, till five o'clock on the day on which the plaintiff received the draft; that the plaintiff did not present the draft before five o'clock on that day; and that on the evening of that day *Brown, Collinson, and Tritton* stopped payment. Lord MANSFIELD, in summing up the evidence to the jury, said, In all mercantile cases there are two objects, convenience and certainty. Under the consideration of convenience, it is to be observed, that it is for the facilitating of trade that paper money is taken. In the taking it, therefore, persons ought not to be laid under too great difficulties, and the making them liable for it from the moment it is received will be to put a clog on the negotiation of it. But every man taking a draft must use due diligence to receive the money; and it is laid down, that if there is time to receive the money, and he neglects to do so, it is at his own peril. On the other hand, to oblige a man to go to the bankers the moment a draft is received would be highly inconvenient. A person may have bills on different bankers, or he may be engaged in other business, and the circumstances of each particular case would require a different rule. There ought, therefore, to be some certain rule to meet all cases of a like kind. Twenty-four hours has been the rule as to bills received in *London* and the contiguous buildings, and there is good sense in that rule. If such a

Monday,  
 10th June.  
 The not presenting a draft upon the same day on which it is received, is not *laches*.  
*Semble*, that reasonable time is a question of law.

## THE TRINITY TERM IN THE

... something certain to go by; and ... the parties have been held liable, the ... have been exceeded. If the jury thought ... to run to receive it, they must ... of taking drafts. The jury ... for the defendant, a new trial was ... of Lord Mansfield; and a rule ...

**Reasonable time must ...**—Thus, if a bill is received in ... must be obvious that the time must be en- ... has drafts payable at different places, he ... of any more drafts. It is not ... but in the present case the ... time to present the draft on the day ... the distance was only half a mile, ... four hours. The cases cited at the trial by the ... all contained some circumstances of dili- ... though ineffectually. *Hankey v. Trotman* (1), *Combs v. Combs* (2), and *Buller's N. P.* ...

**It is of great conse- ...**—It is of great conse- ... should be some established rule as to the ... of these drafts; and leaving the question en- ... prevents any such rule from being esta- ... the practice is to send out all their ... without an army of messengers, it ... every bill separately. They ... that another opinion was entertained ... a question like this, convenience makes the ... can be mentioned which ... that a longer time than this is no *laches*. ... *Hankey v. Trotman*, ... which are not stated in the printed ... The plaintiffs went, at four o'clock, to the banking- ... the bill marked, without procuring payment; ... having stopped at six, this was held to be ... persons receiving drafts hardly ever carry ... but deliver them to their own bankers, ... consequently not presented till the ensuing day.

(1) *R. R. M. 20 G. 2. 1 W.* (2) *B. R., E. 3 G. 3, 1 W.*  
Bl. 417.

As to the opinion of merchants, it is not to be greatly relied upon; and the practice at *Child's* house is stronger than any opinion. What is a reasonable time, is a point of law and not of fact, and the Court, not the Jury, are the proper judges of it. *Moore v. Warren* (c), *Turner v. Mead* (d), *Manwaring v. Harrison* (e), and *Fletcher v. Sandys* (f), were cited.

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LORD MANSFIELD.—Nothing is more mischievous than uncertainty in mercantile law. It would be terrible if every question were to make a cause, and to be decided according to the temper of a jury. If a rule is intended to apply to and govern a number of like cases, that rule is a rule of law. If the rule be that the bill must be presented in a reasonable time, judging from the circumstances of the particular case, then the verdict of the jury is correct; but I doubt extremely whether that rule can be maintained, on account of the great inconvenience which it would occasion in the circulation of paper. Convenience is the basis of mercantile law, and the practice contended for is so inconvenient, that it would put an end to these transactions. Without saying whether or not the rule should be extended so as to give time till the next day, we are of opinion that a case of this consequence ought to be reconsidered.

WILLES, *Justice*.—I am of the same opinion.

ASHURST, *Justice*.—Without laying down any general rule, I think the jury have drawn a very narrow line. I agree with Mr. *Justice* FOSTER in the opinion which he expressed in *Hankey v. Trotman*, that bankers have no right to establish a customary law among themselves at the expense of other men. If the rule upon which the jury have acted were to be established, the inconvenience in the case of bankers would be intolerable. It would be necessary for them to keep 100 servants. There must be a new trial.

BULLER, *Justice*.—We have now under our consideration a general rule. The case of *Hankey v. Trotman* cannot be supported, for, according to the statement, it was not possible for the party to receive the bill sooner. Reasonable time is a question of law. 2 *Inst.* 222, *Co. Litt.* 56 b. The rule

(c) *B. R., H. 7 G. 1, 1 Str.* 415. (e) *B. R., H., 8 G. 1, 1 Str.* 508.  
(d) *B. R., H. 7 G. 1, Id.* 416. (f) *B. R., H. 19 G. 2, 2 Str.* 1248.



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HALL.

ought not to depend on the number of bills received, and the distance of the various places. There ought to be some general rule, and that rule, I think, should be, that it shall be sufficient to present the bill the next day.

LORD MANSFIELD and Mr. *Justice* ASHURST concurred with Mr. *Justice* BULLER as to the propriety of such a rule. Mr. *Justice* WILLES said, that although he at that time concurred with the rest of the Court, yet, as the consequences of laying down a certain rule were highly important, he should hold himself at liberty to revise his opinion.

Rule absolute.

This cause was accordingly tried in the vacation after *Trinity* term, when the evidence varied from that given on the first trial. The defendant proved, that in the case of the bankruptcy of *Chater and Rivers*, Sir *Christopher Raymond*, who was the holder of a bill on that house, suffered the loss of it by not presenting it the day he received it. It was also proved that the loss of three bills drawn on *Fordyce* fell on the holders, they not having presented them the day they received them. Some witnesses also were produced to show that the practice was to present bills on the same day. The plaintiff, in reply, showed that it was the practice of several bankers not to send bills to be received until the next day, unless they were received before nine o'clock in the morning. Mr. *Hankey*, a banker, said, that if he had a draft on *Hoare* which he had not received before nine, he should not send it till the next day. A clerk of *Drummond's* proved that they did not receive on the same day the amount of their drafts on the city, unless paid into their shop before nine, nor of the drafts on their neighbours, unless paid in before eleven. The jury retired, and having consulted for three hours, found a verdict for the defendant, delivering their reason in writing, that, according to the usage of the city, there was sufficient time for the plaintiff either to have received it himself or to have sent it to his bankers.

In the ensuing *Michaelmas* term a rule nisi for a new trial was obtained: but as the same question had arisen in the case of *Appleton v. Sweetapple* (g), the Court, upon making the rule for a new trial absolute in the latter case, enlarged the rule in this. In the course of the same term,

(g) *Vide post.*

*Wallace* produced an affidavit from the defendant, by which it appeared that the plaintiff had agreed to abide by the last verdict, and that the draft had accordingly been proved under the commission against *Brown* and *Collinson*. The Court thereupon

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Discharged the rule.

THE KING v. THE INHABITANTS OF HENSINGHAM.

Saturday,  
15th June.

(*Reported, Caldecott, 206.*)

THE KING v. THE INHABITANTS OF TABBANT LAUN-  
CESTON.

Saturday,  
15th June.

(*Reported, Caldecott, 209.*)

THE KING v. THE INHABITANTS OF ST. PETER AND ST.  
PAUL, IN BATH,

Saturday,  
15th June.

(*Reported, Caldecott, 213.*)

THE KING v. PEDLEY.

Saturday,  
15th June.

(*Reported, Caldecott, 218.*)

MOSELEY, Bart. v. CHADWICK and Another.

Wednesday,  
19th June.

THE declaration stated that the plaintiff, Sir *John Parker Moseley*, was possessed of a market holden in the town of *Manchester*, on *Saturday* in every week, for the buying and selling of all manner of goods usually bought and sold in markets, and of all liberties, customs, privileges, toll, stallages, packages, and other emoluments belonging thereto;

The owner of a market within a town, who receives stallage for the stalls erected therein on his own land, may maintain an action against a person who

erects other stalls within the town upon his own land for the sale of articles which pay no toll to the owner of the market.

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and thereby might and ought to have had certain due and lawful tolls and profits of his said market. That the defendants, on *Saturday*, the 28th of *July*, 1781, being a market-day, erected and set up divers stalls in a certain part of the town of *Manchester* out of the public market of the said town, and not within the market of the plaintiff, but near and adjoining thereto, for the purpose of selling divers goods of such nature as are usually sold in markets, and as were sold in the market of the plaintiff; and continued the said stalls from thenceforth hitherto; and caused and permitted to be sold on the said stalls great quantities of such goods as were on the said days sold in the plaintiff's market, for a certain hire and reward paid therefore to the defendants, without the licence, and against the will, of the plaintiff, whereby the plaintiff lost many valuable and large tolls and profits which he might and ought to have had.

The second count was the same, only stating the plaintiff to be possessed of the *manor and market of Manchester*, and of a certain *other market*, &c.

The third count stated that the plaintiff was possessed of, &c. and hath during all that time provided proper and sufficient stalls, in the said market, for such persons who needed and required the same for the sale of their goods, and also had, and ought to have had, the correction of the said market; and whereas all persons resorting to the said town on *Saturdays* for the sale of their flesh meat and other goods, and selling the same upon stalls, ought to sell the same on the stalls of the plaintiff, paying him a reasonable sum for every stall, the defendants set up stalls, and sold thereon quantities of flesh meat and other goods, &c. as in the first count.

The fourth count was the same in substance, only stating the plaintiff's market to be for the selling of all manner of flesh meat, and that all butchers and other persons resorting, &c. ought, &c.

The fifth count stated the plaintiff to be possessed of the *manor of Manchester*, and of a market to be holden in certain streets and places in the said town, appointed and approved of by the plaintiff, for the buying and selling flesh meat; and that the defendants erected, &c. in a part of the town out of the said streets and places so appointed and sold, &c.

The seventh count charged the defendants with setting up

*another market* near and adjoining to, and within a small distance of, the plaintiff's market, viz. within the distance of 800 yards, and selling and permitting to be sold, &c.

The eighth count was the same, only describing the plaintiff's market to be *in certain streets and places* (as in the fifth count), and stating the market set up by the defendants to be out of the said streets and places, in a part of the town called *Pool Fold*.

The damage was described in all the counts as in the first. And the defendants pleaded not guilty. The cause was tried before WILLES, J., at *Lancaster*, when a verdict was found for the plaintiff, with nominal damages, subject to the opinion of the Court, on the minutes taken down by the Associate, which were to be argued as a case, and which were as follows.

"That the plaintiff has a right to hold a market within the town of *Manchester*. That the market has been extended to various parts of the town, but never to the place called *Pool Fold*. That the plaintiff has accepted and received stallage and tolls in different parts of the town, but that no such stallage or tolls have been taken in the place called *Pool Fold*. That the stalls from whence the stallage was collected were erected upon the streets, waste, or soil of the plaintiff. That the prices demanded and taken by the plaintiff are reasonable. That no stallage has ever been paid except to the lords of the manor; but that where stalls have been erected in the fronts of the houses, and contiguous thereto, a compensation has been made to the owners of such houses by the occupiers of such stalls. That nothing has been exposed to sale upon the defendants' new-erected stalls in *Pool Fold* but flesh meat. That the stalls offered to the butchers by the plaintiff were not sufficiently convenient for the purposes of their trade, and that the market is now more inconvenient than formerly. That the defendants caused to be erected 144 stalls of timber, covered with slate, in *Pool Fold*, being their own soil and freehold, whereupon, for hire and reward, they permitted to be exposed to sale, and sold, flesh meat, which pays no toll within the town, on the days and times mentioned in the declaration. That the plaintiff's stalls are put up every market day, and taken down in the evening of the same day, except a part called the Old Shambles. That *Pool Fold* is within the town of *Manchester*."

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The case came on to be argued on *Friday*, the 26th of *April*, by *Chambre* for the plaintiff, and *Wood* for the defendants.

*Chambre*, for the plaintiff.—The right of the plaintiff is admitted, and the only question that remains is, Whether the defendants have done him an injury? It is objected, that erecting these stalls was not setting up a market; that if it was setting up a market it was no injury, because nothing was sold but flesh meat, which paid no toll; and that stallage, which was paid to him, was only for the use of his soil and stalls, and not as owner of the market. It was also objected that the stalls were not sufficiently convenient, which was left to the jury. The answer to the first objection is, that this is not a question concerning the usurpation of a franchise on the crown; though, if it were necessary so to contend, this was, in fact, an erecting of a market; *R. v. Marsden (a)*; where it was admitted that the party might have an action. The old remedy in these cases seems to suppose that great part of the injury consisted in erecting the building, for it might be thrown down as a nuisance. *Fitzherbert, Quod permittat prosternere quoddam mercatum*. This is therefore a separate and substantial injury. Tolls are not necessarily incident to a market, and when there are no tolls, unless the erecting of stalls be an injury, no injury could be committed, unless it should be depriving the owner of the market of his court of piepoudre, or appointing the clerk of the market, which are burdens rather than benefits. But erecting stalls is an injury. *Prior of Dunstable's case*, 11 H. 6. 19. 2 *Rol. Ab.* 123, C. pl. 1. It is said, that, as flesh meat pays no toll, the selling flesh meat at the defendants' stalls was no injury; but selling goods at the time of the old market being held is itself an injury, and no proof of particular damage is necessary. *Fleta*, b. 4, c. 28, s. 13, 14, 2 *Rol. Ab.* 123, G. pl. 2. But supposing that a loss of profit is necessary to sustain this action, there has been an actual loss; for stallage is a profit belonging to a market, and this has been diminished. Though stallage is not necessarily incident to a market, yet it is a profit which may be connected with it. The crown cannot grant a market to be held on another man's ground; and stallage is the perquisite which is enjoyed by the owner of the soil. It may be pre-

(a) *M. 6 G. 3, 3 Burr.* 1812; 1 *W. Bl.* 579, S. C.

scribed for under the name of toll. 2 *Rol. Ab.* 123, *B. pl.* 2, 2 *Lutw.* 1518. The last objection is, that the plaintiff has not done what he ought to have done, because his stalls were not sufficiently convenient; but this is no defence. It is the duty of the owner to permit persons to come with their goods to the market, but he is not bound to provide stalls; all that he gives is the use of the soil. If stallage were to be found by the owner of the market, he must lose his market whenever he parted with the soil. The decisions as to stallage were fully considered in the case of the *Mayor of Northampton v. Ward (b)*.

*Wood*, for the defendants, made three points: 1. Whether the defendants have set up any new market; 2. Whether an action can be maintained by the plaintiff for mere loss of stallage when there is no loss of tolls; 3. Whether the plaintiff can maintain this action, not having provided sufficient stalls for the selling of flesh meat. The setting up a market must be the usurping a franchise, not merely erecting a building. The defendants have not usurped any of the privileges incident to a market. They have not erected any court of piepoudre, or provided any weights or scales. *R. v. — (c)*, *R. v. Marsden (d)*. [BULLER, J.—In the case in *Shower*, the action was against the persons who bought goods, not against persons who erected stalls.] If no action lies against the person who sells, it would be singular if an action could be maintained against another for furnishing him with the means of conveniently selling. The erection of a building cannot be a ground of action. Some injury must be done. There are no doubt cases of fraud in which actions may be maintained, as for privately selling; but in those cases there is a loss of toll to the owner of the market. The writ of *Quod permittat prosternere, &c.*, supposes every incident to a market. 2. The plaintiff cannot recover for loss of stallage; stallage must always be taken on the plaintiff's soil: but here he claims it as incident to his market, and he sets up no other right to it than as incident to his market. [*Chambre*.—The counts as to stallage may be laid out of the case. It is not said in any of them that the plaintiff was bound to find stalls, but that in fact he did find them. The plaintiff goes only on his right to the market,

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(b) *B. R., M.*, 19 *Geo.* 2, 201.

7 *Str.* 1238; 1 *Wils.* 107, *S. C.* (d) *M.* 6 *G.* 3, 3 *Burr.*

(c) *E.* 34 *Car.* 2, 2 *Show.* 1819.

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and the profits thereof.] It is clear, from *Moor*, 474, and the *Mayor of Northampton v. Ward*, that stallage is incident to the soil only. Then supposing the plaintiff to have been owner of the soil, and not of the market, could he have maintained any action against another person for erecting stalls on his own ground? If the right is incident to the plaintiff's soil, it is incident to another person's. Under this declaration he can only recover damages in character of lord of the market, and not of lord of the soil. 3. The plaintiff not having provided sufficient stalls cannot maintain this action. The plaintiff does not complain of loss of tolls, but of stallage; and this is a sufficient answer to the claim. Suppose the case of a ferry: if a good boat is not provided, any person may carry passengers in another. Where the consideration for the obligation fails, the obligation itself fails too. But it is said that the plaintiff is not obliged to find stalls; it is admitted: but if he neglects to provide them, he must not complain that other people have supplied the deficiency. No other damage has been laid, or proved. The merely assembling and selling in another place, though it may be the subject of an indictment, will not support an action without damage shown. [BULLER, J.—One of the counts states the offence to be erecting stalls and selling too near the plaintiff's market, to the great nuisance of his market. This is the injury, and sufficient to support the action. The count is not hurt by the allegation of the loss of stallage.]

Chambre, in reply.—The cases relative to usurpations of markets do not apply, for it is not necessary here to prove a complete usurpation of the market. Nor is the case in *2 Shower* any authority. There was no claim in that case by the owner of the soil, and no connivance with any other person. It is said that the defendants have no court of pie-poudre, and no clerk of the market; that is the more injurious to the public; and the taking no toll is equally prejudicial to the owner of the legal market. The case of the ferry arises from necessity; but there is no such necessity here, unless the owner of the market shuts it up, and prevents the public from resorting to it. It is said that this action rests on the loss of stallage; but it is not so: stallage is only one of the injuries; and if it had been the only injury the action would have been maintainable.

The case standing over for further argument, it was

argued in *Trinity Term* (7th June) by *Davenport* for the plaintiff, and *Wilson* for the defendants.

Davenport.—The facts found apply to the 1st, 2d, 5th, 7th, and 8th counts. It has been argued on the other side, that because the defendants have not usurped upon the crown there has been no injury to the individual; but that proposition cannot be maintained. When the king grants a market generally, the grantee may keep it where he pleases; or if granted to be held in a town, he may keep it in any place in that town. *Dixon v. Robinson* (c). The plaintiff, therefore, might appoint any part of *Manchester*, and he is injured by the erection of the stalls by the defendants within the town. The levying of a market by the defendants, so near the market of the plaintiff, is in itself an injury. *2 Rol. Ab.* 140. It is not necessary, to constitute an injury, that the plaintiff should have been deprived of tolls. Tolls are not necessarily incident to a market, nor can the owner entitle himself to them under the grant of a market. If a market is granted by the crown subsequently to another grant, and to the injury of the former grantee, he would have a remedy; and can it be said that there shall be no remedy against a private person who unlawfully erects such a market?

Wilson, contra.—The question is, Whether the plaintiff has sustained any damage from the act of the defendants; and whether such damage as he has complained of? There are only two modes by which the plaintiff can have sustained an injury—the depriving him of tolls or of stallage. The flesh meat sold paid no tolls, and he cannot therefore lose any tolls, nor has he been deprived of stallage. The grant of a market does not carry stallage with it, for stallage is not necessarily incident to a market, and the plaintiff can therefore only claim stallage as owner of the soil. But he has declared for an injury to his market, of which there was no evidence.

The Court having taken time to consider, on the 19th of June,

LORD MANSFIELD (after stating the pleadings and case) said, The great question is, Whether an action will lie by the owner of a market against another who takes the profit of his own soil by the erection of stalls, without usurping any

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franchise upon the crown? We are all of opinion that we are bound by the authorities to say that this is an injury for which an action may be maintained. The authorities are, the *Prior of Dunstable's case*, *Br. Ab. Prescription*, 98, 2 *Rol. Ab. Market*, pl. 1 & 2, *Britton*, 169, c. 63, *Yard v. Ford* (f), which latter case is almost in point, and on which we lay great stress. There was no allegation in that case that the defendant took toll, or had a court of piepoudre, or did any thing that would be an usurpation of the franchise. Upon these authorities, and upon that of *R. v. Marsden*, we are all of opinion that there must be

Judgment for the plaintiff.

(f) *B. R.*, *M.* 22 *Car.* 2, 2 *Saund.* 172, 1 *Lev.* 296, *S. C.*

Monday,
10th June.

The defendant received the effects of an intestate under an administration granted to him in *Bengal* as the attorney of the plaintiff, who was a bond-creditor of the intestate. Administration was afterwards granted in this country, and notice was given by the *English* administrators to the defendant not to pay over the effects in his hands to the plaintiff. Held, that the defendant could not deny the title of the plaintiff, but that he was bound to pay over to him the effects of the intestate in his hands.

FARRINGTON v. CLERK (a).

THIS was an action for money had and received, to which the defendant pleaded *non assumpsit*. The cause was tried before Lord MANSFIELD at *Guildhall*, at the sittings after last *Easter Term*, when the jury found a verdict for the plaintiff for £254, subject to the opinion of the Court on the following case:

That at the time the defendant received the effects now in his hands, the plaintiff was a bond-creditor of one *William Plaw*; that the defendant received the effects of the said *William Plaw* under an administration obtained by him in *Bengal* as attorney for the plaintiff, and under a power of attorney granted to him for that purpose; that the defendant arrived in *England* about *December*, 1781, having the said sum of £254 in his hands, being the amount of the effects he had received, and that he still holds the same; that administration was granted to *Plaw's* widow by the Prerogative Court of *Canterbury* in *November*, 1781; and that afterwards, on the renunciation by the widow, in *February*, 1782, administration was granted to *Hodges and Hill*, two of *Plaw's* bond-creditors, by the Prerogative Court of *Canterbury*; that the defendant had notice after the commencement of the action, but before the trial, from the said *Hodges and Hill*, not to pay the said sum of £254 to the plaintiff,

(a) *S. C.* 2 *Chitty's Rep.* 429.

but to retain it for their use, as the administrators in *England* of the effects of the said *William Plaw*. The question for the opinion of the Court was, Whether the plaintiff, by virtue of the administration in *Bengal* to the defendant, as his attorney; or whether the said *Hodges* and *Hill*, by virtue of the administration granted to them here, were entitled to the effects of the deceased *William Plaw* received by the defendant?

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Rous, for the plaintiff.—The question is, Whether the administration granted in *Bengal* be a mere nullity? If it be merely erroneous, then it is matter of appeal, and cannot be controverted in a collateral proceeding like the present. The granting of administrations is a local jurisdiction. *Hilliard v. Cox* (b). The statute 13 *Geo. 3.* empowers the Court at *Bengal* to exercise all the powers given by the charter, and the charter expressly confers the power of granting administration. The administration being to the defendant, as the attorney of the plaintiff, a bond-creditor, puts the defendant, for the purposes of the administration, in the place of the plaintiff. But supposing this grant of administration to be unlawful, it is only the subject of an appeal to the king in council, and until repealed it is valid. There exists then a lawful administration, unrepealed, to the defendant as attorney for the plaintiff. An administrator may retain for his own debt against a creditor of equal degree, and the defendant may consequently retain, as the attorney for the plaintiff, to whom he is liable for the sum retained.

Law, contra.—The defendant admits the validity of the *Bengal* administration; and the only question is, Whether an administrator acting under an administration valid in *Bengal*, is justified in retaining effects, unadministered in his hands, against an administrator having administered in this country. The defendant was not the attorney of any particular creditor, but was entrusted for all; nor was he entitled to retain for any debt but his own. He was an administrator for a limited time, resembling an administrator during minority, or absence, who, acting under a limited authority, can do no act after the determination of that authority. Had he paid over this money to the plaintiff while he remained administrator, it might have been

(b) *B. R., E. 12 W. 3, 1 Salk. 37; 1 Ld. Raym., 562, S. C.*

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valid, but he has done no act whatever amounting to payment. There has not even been a transfer in account, and in order to make an administration of assets there must be an actual application of them. *Tourton v. Flower* (c) and *Chapman v. Turner* (d) were cited.

Lord MANSFIELD.—This case is very clear: there is a contest between two bond-creditors for priority, and one of them gets administration by his attorney. The payment to the attorney was payment to the principal, and it does not lie in the mouth of the attorney to say that he has not received the money for the benefit of the party by whom he was employed to receive it.

Judgment for the plaintiff (e).

(c) *Canc. T. 1735. 3 P. Dison v. Hamond, B. R., H. Williams, 369.*

(d) 11 *Vin. Ab. title, Executor.*

(e) It is said by ABBOTT, C. J., to be "a settled rule of law, that an agent shall not be allowed to dispute the title of his principal, and, receiving money in that capacity, afterwards say, that he did not do so, and did not receive it for the benefit of his principal, but for that of some other person."

59 G. 3, 2 B. & A. 313. So where a person claimed goods in the possession of a carrier, and offered to indemnify him, in an action against the carrier, by the party who had delivered the goods to him, GOULD, J., would not permit the defendant to set up a property out of the plaintiff. *Anon. cited 3 Esp. 115.* See also *Roberts v. Ogilby, Exch., E. 2 Geo. 4, 9 Price, 269.*

Monday,
 17th June.

BARZILLAI v. LEWIS (a).

A ship warranted Dutch, and sailing under a Dutch name, with a Dutch sea brief, was captured by the French, and condemned by sentence of the French court of admiralty as

English property, and by an English name, the sentence not stating the particular grounds of condemnation. Held, that this sentence was conclusive evidence that the ship was not Dutch. *Semble*, that the parties warranting a ship to be neutral are bound to see that she is documented according to the regulations of the belligerent states.

THIS was an action upon a policy of insurance of a ship warranted neutral, viz. *Dutch*. The case was tried before Lord MANSFIELD, when, upon the following facts, the plaintiff was nonsuited:

L'Aimable Agathie, a French ship, was captured by an English vessel, taken into Liverpool, and condemned. She was called *The Three Graces*, and was purchased by a Dutch house, who sent her a Dutch pass, or sea brief, ac-

(a) *S. C. Park Ins. 469, 4th ed.; and from Buller's MSS., 8 T. R. 441.*

According to the treaty of *Utrecht*, translating the *English* name of the vessel into *Dutch*. She sailed from *Liverpool* for *Amsterdam* in *June*, 1780, with a crew consisting of sixteen persons, viz. four *Danes*, two *Swedes*, one *Dutch*, one *Hamburgher*, one *Norwegian*, one *Portuguese*, one *Irishman*, and five *French* prisoners, who were going home. The captain was a *Dane*, having a family at *Liverpool*. He had been two voyages in the *British* service, but had no domicile in *Liverpool*. Others of the crew had been concerned in navigating *English* vessels. Before she reached *Amsterdam* she was captured by a *French* privateer. The admiralty court of *St. Maloes* released the ship, as being *Dutch* property, but on an appeal to the parliament of *Paris* she was condemned as the *Three Graces*, of *Liverpool*, and *English* property.

The defendant relied upon the judgment of the *French* admiralty court at *Paris*, which did not express the grounds of the sentence, but which, it was said for the plaintiff, was founded on certain ordonnances; by one of which, ships, belonging to enemies and purchased by neutrals, are not considered as domiciliated till they have been in a port of the neutral nation, and by another of which ordonnances two thirds of the crew are required to be of neutral nations (b).

A rule having been obtained to set aside the nonsuit, and to enter a verdict for the plaintiff,

Wallace and *Lewis* showed cause. The plaintiff, by his warranty, undertook that the ship was neutral, and it was his duty to see that she was properly protected as such. The furnishing her with a *Dutch* pass could not protect unless she was really a neutral ship, and was a mere fraud. The sentence of the *French* court is conclusive against the neutrality of the vessel.

Lee, S. G., *Davenport*, and *Baldwin*, contra.—The local

(b) In the MSS. of Mr. Justice LAWRENCE it is said that this is the ninth article of an arrêt in 1778. According to *Valin* (vol. ii. p. 267), the same regulation was made in 1704. "Par l'art. 9, sont déclarés de bonne prise tous vaisseaux étrangers, sur lesquels il y aura une subrecargue, marchand commis,

ou officier marinier, d'un pays ennemie de sa majesté, ou dont l'équipage sera composé de matelots ennemis au-delà du tiers, ou qui n'auront pas abord le rôle de l'équipage, arrêté par les officiers publics des lieux neutres, d'où les vaisseaux seront partés."

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regulations of the *French* government on the subject of prizes make no part of the law of nations, nor had the plaintiff any notice of those regulations. The vessel was *Dutch* by the law of nations, and according to the treaties between *France* and *Holland*. The law of *England*, by which the transfer of the vessel to the *Dutch* owner was valid, is not to give way to the occasional regulations of the *French* courts. There is no law of nations declaring that the property in a ship shall not pass until she gets into a port of the country where the purchaser lives. [Lord MANSFIELD.—There is a stipulation between all commercial countries in *Europe* respecting ships' papers, and what papers shall ascertain property.] The ship had the passport required by the treaty of *Utrecht*. By the law of nations, whatever papers are sufficient to pass the property, as between the nation from which she goes and the nation to which she goes, are sufficient evidence of property to all the world, and it is not necessary that the vessel should have been in a neutral port. There can be no doubt but that the property passed as between vendor and vendee. [Lord MANSFIELD.—Any passport given to a ship which has not been within the ports of the country of the owner is a fraud]. If the condemnation was grounded, as it appears to have been, on regulations which bind no country but *France*, the Court will not suffer the sentence to be conclusive evidence, but will allow the question of neutral; or not neutral, to be inquired into. *Bernardi v. Motteux* (c).

Wallace, in reply.—The pass is not agreeable to the treaty of *Utrecht*, for it is to be on the oath of the captain, which implies that the ship must be at the time in a *Dutch* port.

Lord MANSFIELD.—The sentence of the *French* court, whatever it means, is conclusive. The warranty is, that the ship is *Dutch*; the meaning is, that she is *Dutch*, for the purpose of being protected, the warranty being introduced on account of the war. In every war particular regulations are made. The kings of *Spain*, *France*, and *England* have been in the habit of making such regulations; and many in the course of this war have been made by act of parliament. These do not bind other nations, but they are adhered to, and other states must take notice of them for their own safety. The warranty in this case is, that the

ship is neutral, which means neutral not according to the law of nations, but to the marine regulations of all the powers concerned (*d*). The ship was insured by her *Dutch* name, the underwriters take it for granted that she is so; but when the matter is sifted in the *French* courts it turns out that she has not the requisites of a *Dutch* ship, for she never had been in a *Dutch* port, and the sea-brief was not conformable to the treaty of *Utrecht*. In 1778, express regulations were made in *France* that no ships shall be considered as changing their property till they have got into port. The ship was condemned by her *English* name; and I am of opinion that the sentence, whether right or wrong, went on the ground of her being not *Dutch*, and that it is conclusive.

WILLES, *Justice*.—I am of the same opinion. The passport is collusive. The only affidavit is by the supposed purchaser; but by the treaty of *Utrecht* it ought to be on the oath of the captain. The vessel was condemned by the *English* name. There was no ambiguity in the sentence, and the matter cannot therefore be opened.

ASHURST, *Justice*.—If the sentence went on a ground collateral to the property, the plaintiff would be permitted to go into evidence. It was so held in the late case of *Mayne v. Walter* (*e*). But it appears manifestly that this condemnation was on the ground that the vessel was not completely documented as a *Dutch* ship. One cannot read it without seeing that it is so.

BULLER, *Justice*.—The first sentence at *St. Maloes* seems to have gone on particular grounds, as the muster-roll. On that ground they seem to have made their decree. But the sentence at *Paris* is different, and on a libel calling the ship the *Three Graces*, of *Liverpool*. These words are inserted in the condemnation, and it seems to have been done for the purpose of expressing her not to be neutral. But the other ground is clear and decisive, and I entirely agree with the rest of the Court that under a warranty of neutrality the party warranting must see that the vessel is completely documented, and must comply in every respect with the

(*d*) See the observations of *B. R.*, *T.* 41 *G.* 3, 1 *East*, 681. *LAWRENCE, J.*, in *Pollard v. Bell*, *B. R.*, *H.* 40 *G.* 3, 8 *T.* ante, p. 79.
(*e*) *B. R.*, *T.* 22 *Geo.* 3, ante, p. 79.

R. 442. See also *Price v. Bell*,

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marine regulations of the enemies' countries. On both grounds I think the sentence is conclusive.

Rule discharged (f).

(f) See the cases cited in *son*, B. R., H. 25 G. 3, post, the note to *Saloucci v. John*- vol. iv.

Wednesday,
19th June.

MANNING v. NEWNHAM (a).

Insurance on ship, cargo, and freight from *Tortola* to *London*. The ship was driven back to *Tortola*; and being found unfit for the voyage, and it being impossible to repair her, was sold. There were no vessels at *Tortola* by which the cargo could be forwarded, and it was accordingly sold for nearly the sum insured. The insured having abandoned, Held that this was a total loss.

THIS was an action on a policy of insurance at and from *Tortola* to *London* on the ship *Grace*, a prize-ship, loaded at *Surinam*, and on the freight and goods.

The ship was valued at	£2470
The freight	2250
The cargo	12,400
	<hr/> 17,120

at twenty-five guineas per cent. premium, free of particular average. At the trial before Lord MANSFIELD, it appeared that the ship sailed on the first of *August*; but on the second was found unable to keep with the convoy, being leaky; and on the third, making signals of distress, was ordered back by the commodore of the convoy to *Tortola*. On the sixth of *August* she arrived at *Tortola*, and on a survey was found unfit for the voyage, and that it was impossible to repair her in the *West Indies*; on which the ship was sold for £900, and the cargo for £11,700, there being no ship at *Tortola* large enough to bring the cargo to *Europe*. Under these circumstances the owners abandoned to the underwriters, and claimed as for a total loss. A verdict having been found for the plaintiff, the defendant obtained a rule to show cause why there should not be a new trial, on the ground that there was not a total loss either of the ship or of the cargo.

Haworth, *Wood*, and *Murphy*, were heard against the rule; and *Lee*, S. G., and *Wallace*, *contra*. [Lord MANSFIELD.—I think it fit to fix the facts with precision. There was no ship at *Tortola* to bring home the whole cargo. There was no precise evidence of damage to the cargo.

(a) S. C. shortly reported *Ins.* 585; 2 *Camp.* 624 n. from *Park Ins.* 221, 6th ed.; *Marsh* the MSS. of *Gibbs*.

Two captains stated that it was not damaged, and there was no evidence specifying a particular damage. I rather inclined, in summing up, to consider it not as a total loss as to the ship and cargo; as to the freight it was admitted to be such. The jury found that the loss was total. It is a question of law, and I think it should be considered by the Court with care.]

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Cur. adv. vult.

LORD MANSFIELD now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded.—At the trial I felt a prejudice in favour of considering this as a partial loss. The object of the purchaser at *Tortola* was to forward the ship and goods to *London*. The subjects of insurance were three,—the ship, the freight, and the cargo. It was not disputed that the loss of the freight was total, so that the only question was as to the ship and cargo; and we are all come to this conclusion, that the jury have determined that question rightly. The general principle is, that if the voyage, in consequence of a peril within the policy, is lost, or is not worth pursuing, that is a total loss. Here the vessel, which was a large *Dutch* ship with sugars from *Tortola* to *London*, was driven back, and became totally unfit for the voyage. That loss could not be immediately supplied. There was no ship sufficiently large to bring the cargo to *London* (b). What evidently shows that it could not be forwarded is, that part of the cargo, bought by the owners themselves, has not yet arrived in *London*. It is admitted that the freight is totally lost, and the same arguments which apply to the cargo apply also to the ship. Under these circumstances we all think that the voyage is lost, and that is the ground of our determination. This is consistent with former cases, and the introduction of nice distinctions would be inconvenient.

Rule discharged (c).

(b) If the cargo can be forwarded, it is not a total loss. See *Wilson v. Royal Exchange Ass. Co.*, 2 Camp. N. P. C. 625.

(c) The doctrine laid down in the above case has been much narrowed by subsequent decisions, if not overruled. See *Parsons v. Scott*, C. B., E. 50 G. 3, 2 Taunt, 363; *Ander-*

son v. Wallis, B. R., M. 54 G. 3, 2 M. & S. 240; *Hunt v. Royal Exchange Ass. Co.*, B. R., E. 56 G. 3, 5 M. & S. 47. But see *Wilson v. Royal Exchange Ass. Co.*, 2 Campb. N. P. C. 625, where Lord ELLENBOROUGH said he acceded to the principal case.

C A S E S
ARGUED AND DETERMINED
 IN THE
COURT OF KING'S BENCH,
 IN
MICHAELMAS TERM,
 IN THE
TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.

1782.

Friday,
8th November.

A, as agent for various persons (but not receiving a *del credere* commission), effected various insurances for his principals with *B*, an underwriter, upon which insurances various losses and returns of premium were due. *B*. having become bankrupt, Held, that in an action, by his assignees, against *A*, for the amount of premiums, the latter could not set off the amount of the losses, or of the returns of premium.

WILSON and Another, Assignees of FLETCHER, v. CREIGHTON and Another (a).

THIS was an action of assumpsit. The declaration contained the common counts, charging the defendants with being indebted to the bankrupt before bankruptcy; and another set of counts, charging them with being indebted to the plaintiffs as assignees. The defendants pleaded the general issue, and gave notice of set-off, "in £3000, upon divers policies of insurance by the bankrupt before he became bankrupt, underwritten, as an assurer to the defendants, upon divers goods, ships, and merchandizes, in the respective policies mentioned, which goods, ships, and merchandizes, have been totally lost to the defendants; and also in £2000," &c.

The cause was tried at *Guildhall*, before Lord MANSFIELD, after *Easter Term* last, and a verdict was found for the plaintiffs for £835, 2s. 2d. subject to the opinion of the Court on the following case.

"The defendants had large dealings with *Fletcher*, the bankrupt, in the following manner. As agents or factors to various correspondents, they paid to him, or were debited by him, for premiums upon insurances on behalf of their

(a) S. C. cited 1 T. R. 113.

correspondents, and had credit for the losses as they happened, and for the return of premiums. The defendants had no commission *del credere*, and none of the correspondents for whom they insured are insolvent. But to all their correspondents, except one, they are in advance, more or less, on account of the policies. *Fletcher* became a bankrupt on the 23d of November, 1780."

The question for the opinion of the Court was, "Whether the defendants can set off the debit side of the account hereunto annexed against the credit side thereof; which account has been drawn out since the bankruptcy of *Fletcher*, by the plaintiffs, the assignees, as to the credit side; and by the defendants, as to the debit side thereof. If the Court shall be of opinion," &c.

[The credit side consisted of various premiums on different vessels, not mentioning on whose account the insurance was made, amounting in all to £947, 19s. 8d. The debit side consisted of various losses, and returns of premium, on the same vessels, to the amount of £835, 2s. 2d. which the defendants proposed to set off. The balance, being £112, 17s. 6d., they had paid into Court; but by a mistake in the account, afterwards discovered, it appeared that they had not covered the whole of the plaintiffs' demand, so that, even if the Court had been of opinion with them, there must have been a verdict for the plaintiffs for £6 odd.]

Law, for the plaintiffs.—The question, whether these are mutual credits, will depend on the statutes of set-off. There must be an exact mutuality. The parties must sue and be sued in the same right. To this purpose the cases are numerous and uniform. The demand is for different premiums, which, according to usage, are not paid at the time, but as between the assurer and assured are considered as paid, and the credit, by usage, is given to the broker only. The test is, mutuality of remedy. *Creighton* could not bring an action for these losses without averring an interest in the assured. It would otherwise be a wagering policy. The action is for different premiums, and the set-off for different losses. The employment of the same broker makes no privy. If various customers keep money with the same banker, the latter cannot sue for sums due to his various customers. With regard to the premiums, from the time the receipt is written on the policy, they are considered as

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paid by the assured, and the credit for them is given by the insurer to the broker. The broker could not have sued for the returns of premium, nor could he have proved the debt under the commission.

Piggot, for the defendants.—There are two cases of the same nature standing for argument—the present, and that of *Wilson v. Watson and Rashleigh*. The only difference is, that, in the latter, the policies were made in the defendants' own names, which is not so in the present case. [*Cur.* This difference does not appear in the case. We must take it as it stands in the case.] The defendants did not act as brokers; they purchased goods here, insured them, and sent them abroad on account of their correspondents: but they were liable to the sellers here, and, in case of loss, they undoubtedly had a lien on the policies. They transacted their own business without the intervention of a broker. The premiums were not paid at the time, but were carried to account, and settled at *Christmas*.

The case must be governed by the statutes of set-off. At common law there was no set-off. The statutes with regard to set-off have been liberally construed by the Court of *Chancery*, and there is no difference between the courts in the construction of the acts. In equity, bonds not due have been allowed to be set off, deducting the discount. *Ex parte Deeze (b)*, *Green v. Farmer (c)*.

LORD MANSFIELD.—First, with regard to the premium, the credit is given to the broker; and as between the principal and the underwriter it must be regarded as paid. The broker is the debtor for it. The credit could not be to the man who does not appear, and who is not known. Then what would the broker set off? Losses payable to the principal, and for which the principal alone could sue. So as to the return of premium; that must be to the principal. I agree that the construction must be the same in this court as in a court of equity; but it seems to me that these debts cannot be set off against one another, for they are due to different persons.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—I am of the same opinion. In *Green*

(b) *Canc.* 1744, 1 *Atk.* 269.

(c) *B. R.*, *E.* 8 *G.* 3, 4 *Burr.* 2214.

v. *Farmer*, the debts were mutual; here they are in different rights, and a court of equity never went so far as to allow a set-off in such a case.

Postea to the plaintiffs (d).

(d) The cases on this subject collected *Montagu on Set-off*, are very numerous; see them 22, 2d ed.; *Hughes on Insurance*.

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HENCHMAN v. OFFLEY (a).

THIS was an action on a policy of insurance for £6000 on goods, at and from *Bengal* to *London*, on board any ship or ships which should have sailed on or between the 1st of *September*, 1779, and the 1st of *June*, 1780. At the trial, before Lord MANSFIELD, it appeared that the plaintiff wrote from *India* to his correspondent in *London* to make insurance on goods to be shipped on ship or ships for *England* to the amount of £6000. He afterwards wrote for a second insurance, in the same manner, for £4000, on goods at and from *Bengal* to *London*, on board any ship or ships which should sail between the 1st of *February* and the 31st of *December*, 1780. The policies were effected accordingly, and the plaintiff shipped the goods on board two ships, the *General Barker* and the *Ganges*; and at the time of the shipping of the goods on board the *General Barker*, he made a declaration, before Sir *Elijah Impey*, that he had shipped goods on board that vessel to the amount of £4889, under the first policy. The goods shipped on board the *Ganges* were of the value of £1100. Both the vessels sailed within the time mentioned in the first policy, and arrived in the Channel together, but the *General Barker* was afterwards lost. At the trial the plaintiff contended, that the policy upon which the action was brought related wholly to the goods on board the *General Barker*; and Lord MANSFIELD admitted evidence of the declaration made by the plaintiff before Sir *Elijah Impey*. For the defendant it was insisted that such evidence was inadmissible, and that the second policy ought to come into contribution. A verdict for £6000 having been found for the plaintiff, *Cowper*

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An insurance was effected on goods on board any ship or ships from *B.* to *L.*, sailing within certain dates; and another insurance was effected in the same terms, on the same voyage, within certain other dates. The insurer shipped goods on board two vessels; and not having the policies, made a declaration before a magistrate, that he had shipped goods to the amount of £4889, on board vessel *A.*, under the first policy. Both vessels sailed within the time mentioned in the first policy, and *A.* was lost. Held, that this was a sufficient appropriation of the first policy to the goods on board of *A.*

(a) S. C. 2 H. Bl. 345, n. (a); *Marsh. Ins.* 173, 2d ed.

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moved for a new trial. The Court thought the case very clear, but granted a rule to show cause, in order to set right a mistake which the plaintiff had made in computing the loss.

Lee, Cowper, and Piggot, in support of the rule.—The contract between these parties must be construed according to the situation in which things stood at the time when it was entered into, and cannot be affected by any thing done afterwards by one party without the participation of the other. At the time of the policies being underwritten, nothing was stated to the underwriters, as to the plaintiff shipping so much, on board the *General Barker*, and so much, on board the *Ganges*; all that the underwriters knew was, that the goods were to be shipped on board a ship or ships. If the *Ganges* had been lost, the underwriters on the first policy might have been called upon to contribute to the loss, for they had no knowledge of the declaration made by the plaintiff at *Bengal*. The insurance under the first policy attached upon any goods loaded on board any ship or ships sailing on the voyage insured within the period mentioned in the policy. If, then, the underwriters on the first policy would have been bound to contribute in case the *Ganges* had been lost, they are entitled to the benefit of salvage on all the goods on board both ships.

Wallace, contra.—It is certainly not enough, in order to effect an appropriation of a particular policy, that the insurer should form a resolution in his own mind, which he may disclose or not, as he pleases, after the event; but here he does every thing that it was in his power to do. Not having the policies in *India*, he could not indorse on them the memorandum of appropriation; but he goes before the first magistrate of the place and takes a solemn oath of the apportionment which it was in his discretion to make, without communication with any underwriter. Could the underwriter say, You shall not distribute your property as you please; but I will apply to this policy all the goods you ship, in whatever ship, and to whatever amount?

Lord MANSFIELD.—The only question is, if salvage (*b*) is to be allowed for £1100, the difference between the sum

(*b*) Mr. Wilson, in his note of this case, observes, that the word salvage is ill applied, and that the Court only meant that the whole interest in both ships was £6000, of which £1100 was safe.

insured and the value of the goods on board. [*Wallace*.—We add the premium, which makes up the £6000.] The plaintiff had no idea of insuring the premium—there must be salvage as to £1100. It is clear, from the letters, that that was not intended. It was an after-thought.

BULLER, Justice.—The insurance is on the goods only; the plaintiff has not insured the premium.

Per Cur. The attorneys will settle it without a new trial, and there must be no costs (c).

(c) See *Kewley v. Ryan*, C. B., T. 34 G. 3, 1 H. Bl. 343.

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APPLETON v. SWEETAPPLE (a).

THIS was an action against the defendant as drawer of a bill of exchange payable on demand. It was tried before Lord MANSFIELD, at the sittings after last *Trinity term*, when the following appeared to be the facts of the case. The bill of exchange, which was drawn by the defendant upon *Brown and Collinson*, was paid to the plaintiff at the *Corn-market* at *Mark Lane*, on the sixth of *March*, about twelve o'clock. The plaintiff kept cash with *Dorrien and Co.*, who were bankers east of the *Mansion-house*, to whom the bill was sent a little before five o'clock on the same day, and by the bankers it was presented the same day to *Brown and Collinson*, by whom it was marked (b), but not paid, nor was it ever paid by them. The bill would have been paid to a private person, but bankers do not pay to each other after four o'clock. The custom of the *Corn-market* was proved to be, that after breaking up about one o'clock, the clerks go home, where they are employed half an hour or more in accounting for the bills received that day; and they then send them to the bankers, sometimes before dinner, and sometimes after. The bill in question was carried to *Dorrien's* after the clerk had dined. For the plaintiff it was proved, by a salesman in *Smithfield market*, that he sometimes received drafts to the amount of many thousand pounds; and that he could not, if he kept six men for the

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Where a bill payable on demand is taken in payment for goods, it is not necessary to present it the same day on which it is received.

Seemle that reasonable time is a question of law.

(a) *S. C.* cited *Bayley on Bills*, 192; 1 *Esp. Dig.* 69, 4th ed. ing a bill or check, see *Robson v. Bennet*, C. B., E. 50 G. 3, 2 *Taunt.* 388.

(b) As to the effect of mark-

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purpose, present them the same day. It appeared that there were four bankers east of the *Mansion-house* who did not use the clearing-house, and fourteen west of the *Mansion-house* who never sent their drafts till the next day (c). Bankers using the clearing-house did not pay after three o'clock as between one another; bankers not using it, not after four o'clock as between one another. Lord MANSFIELD, in summing up to the jury, directed them as follows. "The question is, what time the holder of a draft has to present it to the banker on whom it is drawn, without running the hazard of his solvency. The plaintiff says, until the next day; the defendant says, only the time necessary for carrying it. The general question is, what is the time within which it is convenient and reasonable to force the holder to present, or make him liable in case of insolvency. It is a question of law and fact proper for the determination of a jury. In another case (d), a jury have given their opinion, but with too great a latitude; for they say, that, by the usage of the city, the plaintiff might either have sent the draft to his bankers, or have received it himself, before the house of *Brown and Collinson* stopped payment; but they have not defined the usage. By the general rule, the holder of a bill has until the next day to receive it. A man may do less, but he cannot do more, than the rule allows. No agreement can relax what the law obliges; but, within its limits, men may make regulations for their own convenience. The last jury, being aware of this, established their verdict on the usage: you are therefore to find if there be any such usage; and if there be none, this case is the same as that of a draft on a west-end banker. But whenever there is an usage properly so called, such usage makes the law; and every merchant is supposed to take notice of it, and to refer to it as much as if it were expressed. The usage, as stated, is this—that a draft received in the city east of the *Mansion-house*, by a person not a banker, on a banker east of the *Mansion-house*, ought, if there be time, to be carried for payment before five o'clock (e). The draft in question was received

(c) See *Rickford v. Ridge*, jury in *Rickford v. Ridge*, 2 *Campb.* 537.

(d) *Medcalf v. Hall, B. R.*, T. 22 G. 3, ante, p. 113. In that case Lord ELLENBOROUGH said, "I cannot hear of any arbitrary distinction between one part of the city and another. It

(e) This was stated to be the practice by one of the special

a little before twelve, and sent by the plaintiff to his banker about half after four. There is no evidence of any such usage. Mr. *Hankey* proves, that until he belonged to the clearing-house, he never sent his drafts until the next day, if he received them after eleven o'clock. There is no evidence of any usage as to persons not bankers; and if they have till the next day (though the bankers may, for convenience, agree to settle sooner), the law cannot be narrowed as to them. The practice of the clearing-house is only evidence of a usage confined to certain bankers, and not extended to others. The Bank of *England* never send until the next day, and there is no difference between the Bank of *England* and other bankers. Take the usage into your own hands, and see whether you can, on your consciences, say, that there is such an usage within the city of *London*." The jury having consulted for three hours, brought in a verdict for the defendant, saying, that they found the usage, except that there was no difference of east and west of the *Mansion-house*. A rule for a new trial having been obtained,

Wallace showed cause, and contended, that after three verdicts the same way in this case, and in *Medcalf v. Hall*, the Court would not interfere.

Lee and *Wood*, *contra*.—The usage found by the jury is contrary to all evidence, and to every day's practice; and it has been held, in numerous cases, that a draft may be kept till the next day. *Moore v. Warren* (*f*); *Turner v. Mead* (*g*); *Mainwaring v. Harrison* (*h*); *Fletcher v. Sandys* (*i*). It was said by the Court, in *Medcalf v. Hall*, that *reasonableness* was a question of law; and there are many authorities to the same effect, *Co. Litt.* 56, *b. 2 Inst.* 222. So the rules as to reasonable fines on admittances to copyholds, and as to the length of time in cases of notices to quit, have been laid down by the judges. If this be the law, these juries have acted directly contrary to law. But supposing it not

is not competent to bankers to 415.

lay down one rule for the east- (g) *B. R., H. 7 G. 1, 1 Str.*
ward of *St. Paul's*, and another 416.

for the westward. They may (h) *B. R., H. 8 G. 1, 1 Str.*
as well fix upon *St. Peter's* at 508.

Rome." (i) *B. R., H. 19 G. 2, 2 Str.*
(f) *B. R., H. 7 G. 1, 1 Str.* 1248.

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to be a question of law but of fact, this jury have found a verdict contrary to evidence. The usage, as now found by the jury, is against the evidence on the trial, for there was no proof of general usage in the city. It was proved that there was no such usage at *Smithfield*, the *Corn-market*, or the *Bank*. The particular agreement of certain bankers as to the clearing-house, which is a private institution, cannot make an usage. [Lord MANSFIELD inquired whether there was any instance of the Court having granted a third or fourth new trial on the same point. *Lee* replied that there was in *Chancery* (k).]

Lord MANSFIELD said he was mistaken if the Court had laid it down that, notwithstanding any usage, the next day was the time. All that he understood to have been said was, that the next day should be the rule if it stood clear of any usage, but he thought that clear usage might vary the rule. He had doubts about the question; but in this case he thought there ought to be a new trial, since the *general* usage was not supported by the evidence.

BULLER, *Justice*.—In a question of law, however unpleasant it may be to us, we must not yield to the decision of a jury. I do not doubt that a special jury in *London* will, if desired, find a special verdict. The usage is to be considered, but such usage must be reasonable, and it is for the Court to say whether it is good or bad. I think that this verdict is against evidence, as well as against law, and I have not a doubt about granting a new trial. [Lord MANSFIELD.—If a new trial be granted, is evidence of usage to be received? I have no idea that it cannot.] As a general question, I think it ought; but the judge should direct the jury to disregard it if it be unreasonable.

ASHURST, *Justice*, said, that reasonableness or unreasonableness was a question of law; that he did not think the evidence could be stopped *in limine*, because it could not be known what usage would be proved; but that the judge should direct the jury what degree of regard they should pay to it, and should direct them not to pay any if he thought it unreasonable. That if he were to try the cause,

(k) A third trial was granted *Goodwin v. Gibbons*, B. R., T. in *Tindal v. Brown*, B. R., E. 7 G. 3, 4 Burr. 2108; *Tidd's* 26 G. 4, 1 T. R. 171. See also *Pr.* 936, 8th ed.

he should have no difficulty in telling the jury, that he thought the usage bad, both from the shortness of the time and the uncertainty as to different persons.

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Rule absolute.

The cause was again tried at the sittings after this term, when the jury again found a verdict for the defendant. A motion was again made for a new trial by *Lee*, in *Hilary term*, 23 Geo. 3, when the Court refused it, as it appeared that the usage proved at the trial was more general than that insisted on at the former trials, not being confined to the part of the city east of the *Mansion-house*, but general throughout the city. This, *BULLER, J.*, said, varied the case much; and as the Court had pointed out to the plaintiff how he might raise the question on the record—by demurrer to evidence, or bill of exceptions, as should be proper—and as he had not done so, he was not entitled to another new trial (*l*).

(*l*) With regard to the period within which bills payable at a certain time after sight must be presented, see *Muilman v. D'Eguino*, C. B., M. 36 G. 3, 2 H. Bl. 565; *Goupy v. Harden*, C. B. 57 G. 3, 7 Taunt. 159; 2 *Marsh*. 454; *Holt*, N. P. C. 342, S. C.; *Fry v. Hill*, C. B., E. 57 G. 3, 7 Taunt. 397; *Shute v. Robins*, coram Lord TENTERDEN, 1828, 1 *Moody & Malkin*, N. P. C. 133.

As to the time of presenting checks and bankers' notes, see *Robson v. Bennet*, C. B., E. 50 G. 3, 2 Taunt. 388; *Richford v. Ridge*, coram Lord ELLENBOROUGH, 1810, 2 *Campb*. 537; *Pocklington v. Silvester*, Sitt. after T. T. 57 G. 3, *Chitty on Bills*, 274, 7th ed.; *Beeching v.*

—, coram GIBBS, C. J., *Holt*, 315 (n); *Williams v. Smith*, B. R., E. 59 G. 3, 2 B & A. 496; *Camidge v. Allenby*, B. R., H. 7 & 8 G. 4, 6 B. & C. 373; *James v. Holditch*, B. R., E. 7 G. 4, 8 D. & R. 40.

In several of the cases above mentioned, the question, whether reasonable time is a matter of law or of fact, arose. As to this point, see also *Tindal v. Brown*, B. R., E. 26 G. 3, 1 T. R. 168; *Hilton v. Shepherd*, B. R., E. 36 G. 3, 6 *East*, 14 (n); *Darbishire v. Parker*, B. R., H. 45 G. 3, 6 *East*, 3; *Parker v. Gordon*, B. R., E. 46 G. 3, 7 *East*, 386; *Bateman v. Joseph*, B. R., T. 50 G. 3, 12 *East*, 434; *Facey v. Hurdom*, B. R., T. 5 G. 4, 3 B. & C. 216, 5 D. & R. 58 S. C.

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A bond given  
by a parson to  
the patron to  
resign upon re-  
quest is legal.

## THE BISHOP OF LONDON v. FYTCH (a).

THIS was a writ of error from the *Common Pleas*, in a *quare impedit*, brought by *Lewis Disney Fytch* against the *Bishop of London*, for refusing to admit *John Eyre*, clerk, to the church of *Woodham Walter* in *Essex*.

The *Bishop* pleaded two pleas (b). 1. That the said church is a benefice, with the cure of souls; and being vacant, as aforesaid, it was corruptly, simoniacally, and unlawfully, and against the form of the statute, &c. agreed by and between the said *Lewis Disney* and one *John Eyre*, that the said *Lewis Disney* should present the said *John Eyre*, his clerk, to the said church, so being vacant as aforesaid; and that the said *John Eyre* should, in consideration thereof, seal, and as his act deliver (a general bond of resignation): that the said *Lewis Disney*, in pursuance of the said agreement, did corruptly, &c. present the said *John Eyre* to the said *Bishop* to be admitted, instituted, and inducted; that the said *John Eyre* corruptly, &c. executed the bond, which the said *Lewis Disney* corruptly accepted; by means of which premises, and by force of the statute, the presentation of the said *John Eyre*, by the said *Lewis Disney*, became void.

The *Bishop* pleaded, 2. That he claims nothing but as ordinary; and that the said church being vacant, as aforesaid, it was for the purpose of investing the aforesaid *Lewis Disney* with an undue influence, power, and control over the said *John Eyre* as rector of, &c. in case the said *John Eyre* should, upon such presentation to be made by him the said *Lewis Disney*, as is hereinafter mentioned, be admitted, instituted, and inducted into the same, agreed by and between, &c. (as in the first plea.) And the said *Bishop* further says, that upon such presentation of the said *John Eyre* to him the said *Bishop*, for the purpose aforesaid made,

(a) *S. C.* 1 *East*, 487; and in error, 2 *Br. P. C.* 211, 2d ed.; *Cunningham's Law of Simony*, 52.

(b) In support of his defence in this action, the *Bishop* filed a bill for a discovery, to which

the defendant demurred; but the *Lord Chancellor* overruled the demurrer. See *Bishop of London v. Fytch*, *Canc. T.* 21 *Geo.* 3, 1 *Br. C. C.* 96; Appendix to *Cunningham on Simony*, 184.

he the said *Bishop*, as ordinary of the said church, did then and there duly inquire concerning the fitness of the said *John Eyre* to be by him admitted, instituted, and inducted into the said rectory and parish church; and that upon such inquiry in that behalf made, he the said *Bishop* did fully discover and find out that the said *John Eyre* had sealed, and as his act and deed delivered to the said *Lewis Disney* such writing obligatory as aforesaid, made in such penal sum and with such condition for making void the same as is hereinbefore mentioned; and that by means thereof the said *Lewis Disney* would have acquired and had an undue influence, power, and control over the said *John Eyre* as rector of, &c. if he the said *Bishop* had upon such presentation admitted, instituted, and inducted the said *John Eyre* into, &c.; and by reason of the premises, the said *John Eyre* then and there became and was an unfit person to be by him the said *Bishop* admitted, &c. into the rectory, &c. upon and by virtue of that presentation.

To the first plea the plaintiff demurred generally; to the second plea he demurred, and assigned for cause that there is no specification of the undue influence, or power, or control mentioned, &c. to which the said *Lewis Disney* could give any answer, or upon which a proper issue could be joined; and that it is not alleged how and in what manner the said *John Eyre* was or did become a person unfit to be admitted, &c. so that any issue could be taken upon such allegation of his unfitness.

The *Bishop* joined in demurrer, and in *Hilary Term*, 1782, the Court of *Common Pleas* gave judgment for the defendant in error upon both pleas.

*Adam*, for the plaintiff in error.—An objection was taken in the Court of *Common Pleas* to the second plea, which it will be proper to dispose of in the first instance. It was said that the canon law ought to have been set out in that plea. Now by the statute *Articuli Cleri*, c. 13, and by other statutes, the canon law has been adopted, and is become part of the common law, and it was therefore unnecessary to set it out.

It is not requisite to go through all the cases on resignation-bonds. Those cases arose between the parties to the bonds, which were supported on the principle *Quod fieri non debet, factum valet*. This question comes on in another shape. The *Bishop*, who possesses the power of judging,

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has deemed the contract improper. The statute of simony, 31 *Eliz. c. 6, s. 5*, provides, that if any person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, &c., or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person, &c. every such presentation shall be void. This statute provides against the sale of presentations; but should the Court decide against the plaintiff in error, that provision would become nugatory. The parson has only to refuse to resign, when the patron may sue him on his bond, and recover the price of the presentation. That the *Bishop* has the full discretion over the institution, and has the power of saying who is a proper person to fill the church, appears from *Lynwood*, 107, 281, and from 1 *Inst.* 96, 344. The policy of the law has always been against these bonds; *Johnes v. Lawrence* (c); and there are several cases in which their validity has been doubted. *Swayne v. Carter* (d), *Grahame v. Grahame* (e). There is a manuscript note of an opinion of POWELL, J., to the same effect. The ecclesiastical law has established various rules for the behaviour of the clergy, and by those rules the parson must take an oath of canonical obedience; but how can he be obedient to the ordinary when he is bound to resign at the will of the patron? He is also bound to resign purely; and how can he do so under this bond? Independently of simony, this bond is bad by the common law. It was said in the Court of *Common Pleas* that patronage was merchantable. It is so; but it is merchantable only according to law, and not otherwise. The definition of a benefice is, that it is an ecclesiastical freehold, an office for life. *Le Febure's Traité des Fiefs*; *Father Paul's History of Ecclesiastical Benefices*, 33; *Craig de Feudis*; *Wood's Institutes*, 152. A benefice, being an office for life, is not defeasible by the parson and patron. No resignation is valid till accepted by the proper ordinary. The ordinary is not obliged to accept a resignation; and the law has appointed no known remedy if he will not accept, any more than if he will not ordain. *Gibs.* 822; 3 *Burn*, 321. He who attempts to alter the tenure of his office acts contrary to law, and is an unfit

(c) *B. R., T. S., Jac. 1, Cro. Jac.* 248.

(d) *Comb.* 394.
 (e) *Canc.* 1682, 1 *Vern.* 131.

person to be instituted. An office cannot be granted upon any other tenure than has been usual. Even the king cannot grant offices in any other manner or form than has been usual. 4 *Inst.* 75, 87, 146. *Com. Dig. Officer*, (A. 1). If the stipulation contained in the bond had been inserted in the instrument of presentation to the bishop, can any person say that it would not have been competent to the bishop to refuse such a presentation? Suppose the case of a bishop himself who should give such a bond to any person, can there be any doubt that it would be void? and shall it void in a superior and not in an inferior? Going out of ecclesiastical offices, suppose that the Chancellor took such a bond from a Master in Chancery, or that the Judge of a court of law should give such a bond, would not the act in such cases be illegal?

Lee, contra.—General bonds of resignation are good both at law and in equity, unless an ill use is attempted to be made of them. It is so said by Lord HARDWICKE in *Grey v. Hesket* (*f*), and in the same case, which was sent out of Chancery into this Court (*g*), it was held by this Court that such bonds are valid. The defendant there relied upon the same objection as has been taken on the other side, and pleaded that he offered to resign the living, but that the ordinary refused to accept the resignation. The answer given by the Court was, that the defendant had undertaken for the acceptance of the bishop. There are numerous cases in which it has been held that general bonds of resignation are good. In *Baker v. Watson* (*h*) the Court said, that it had been above a dozen times adjudged that such a condition is good, and in *Peele v. the Bishop of Carlisle* (*i*) the Court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established even in courts of equity. Injunctions have indeed been obtained against such bonds, but only in cases where an ill use has been made of them, the Court recognizing the bonds themselves as good. *Durston v. Sandys* (*k*), *Peele v. Capel* (*l*). What is the "undue in-

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(*f*) *Canc.* 1755, *Amb.* 268. 1 *Str.* 227.
(*g*) *B. R.*, *H.* 28 *Geo.* 2, 411. (*k*) *Canc.*, *M.* 1686, 1 *Vern.*
3 *Burn's Ecc. L.* 354. (*h*) *B. R.*, *H.* 20 & 21 *Car.* 534.
2, 2 *Kebl.* 446. (*l*) *Canc.*, *M.* 9 *G.* 1, 1 *Str.*
(*i*) *B. R.*, *M.* 6 *Geo.* 1,
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fluence, power, and control," mentioned in the plea, and how can issue be taken on such an allegation? Had the bond been given or used for any ill use, as if it were given to elude the statute of simony, that might have been alleged in the plea, and if unanswered it would have avoided the instrument. The language of the bishop, in his plea, amounts to this: "I will not admit this man, because he has entered into a bond which is good according to the law of the land."

LORD MANSFIELD.—I have a full note of the argument of this case in the Court of *Common Pleas*. The general question brought before this Court by the pleadings is the legality of the bond; for the statement of "undue influence" is too vague, and therefore I leave that out of the case. But I declare my assent to the doctrine of the Court of *Common Pleas*, that if a corrupt purpose were alleged and not denied, it would avoid the bond at law without an injunction. If the bond were made use of for the purpose of demanding money, or of procuring the giving up of tithes, or for any other bad use, it would be evidence of a simoniacal contract. I also lay out of the case the objection as to the canon law, which indeed is more general than the common law. The only question then is the validity of the bond. The statute of simony passed in the reign of *Elizabeth*, and in the time of *James I.* such a bond was held good. In 1698, Bishop *Stillingfleet* wrote an excellent treatise (m) against these decisions of a court of law; and if the matter were entire, much is said in that discourse that might merit consideration. But it cannot now be argued. We are bound by the decisions, if we thought them ever so wrong. The general question is so well established that I do not think it would be decent to go into it.

WILKES, *Justice*, of the same opinion.

ASHURST, *Justice*.—I also am of the same opinion. If the bond be legal, as it is according to the decisions, the different form in which this comes before the Court will not vary the case. The bishop only says, "I will not grant institution, because a legal bond has been given by the clerk."

(m) *A Discourse concerning the Rights of Bishops and Clergy in Point of Law and Canon Law*, by the Right Rev. Father in God, Thomas Stillingfleet, Bishop of Worcester. London: Printed by J. Sturges, 1698. See also *A Letter to the Archbishop of Canterbury in Answer to the Bishop of Salisbury's Sermon of Resignation*. London: Printed by W. Woodcock, 1755.

BULLER, Justice.—Nothing but positive authority could induce me to concur in opinion with the rest of the Court. I think there is great weight in the opinion of Mr. *Justice POWELL*; and if the inconveniences which have followed had been foreseen, I think the Judges would never have determined as they have done. It is difficult to reconcile the decision to the principles of pleading. The bond is to resign on request, which means any request. If the request were unreasonable, how could that be put upon the record? It would be a departure. It is a great stretch to say that though the bond may be bad it must be good. From the record we cannot say what was the motive for giving it. As to the second plea, the undue influence not being assigned, it must be bad. The decisions are uniform, and unless we support them, the rule of *stare decisis* must be blotted out of the books.

LORD MANSFIELD.—I forgot to observe, that there seems to me to be no difference between the present case and a case where the question arises between obligor and obligee.

Judgment affirmed.

Upon this judgment a writ of error was brought in the House of Lords, and several questions were proposed for the opinion of the Judges. After the Judges had delivered their opinions, a debate and division of the House ensued, when there appearing to be, for reversing the judgment nineteen, and against it eighteen, it was ordered and adjudged, that the judgment given in the Court of *King's Bench*, affirming a judgment given in the Court of *Common Pleas*, should be reversed (n).

(n) 2 *Brown's P. C.* 211, 2d edit., *Cunningham's Law of Simony*, 52 S. C.

Since the decision of this case, it has been held, that a bond given by an incumbent to reside on the living, or to resign if he do not return to it after notice, is good. *Bagshaw v. Bossley*, B. R., M. 31 Geo. 3, 4 T. R. 78. In that case Lord KENYON observed, "I avoid saying any thing respecting the case of the *Bishop of London v. Fytch*. When that question comes again

before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary." So a bond of resignation, with condition to reside and to keep the premises on the living in repair, was held legal. *Partridge v. Whiston*, B. R., T. 31 Geo. 3, 4 T. R. 359. It was also for some time considered that the authority of the decision by the Lords did not apply to bonds of resignation in favour of a specified person. See *Newman v.*

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Newman, B. R., *E* 55 *Geo.* 3, 4 *M. & S.* 66; *Lord Sondes v. Fletcher, B. R.*, *T.* 3 *Geo.* 4, 5 *B. & A.* 835; *Dashwood v. Peyton, Canc.*, 1811, 18 *Ves.* 37; *Rowlatt v. Rowlatt, Canc.*, 1820, 1 *Jac. & Walk.* 283. But on an appeal to the House of Lords in the case of *Lord Sondes v. Fletcher*, the judgment of the Court of King's Bench was reversed. 3 *Bingh.* 501; 1 *Bligh, N. S.*, 144. And it was held that a bond given for resigning a living in favour of one of two brothers of the patron was void. In consequence of this decision two statutes were passed, of which the first, 7 & 8 *Geo.* 4, c. 25, has a retrospective operation only.

By the second of those statutes (the 9 *Geo.* 4, c. 94), engagements entered into for the resignation of any benefice, to the intent that one, or that one of two persons specially named therein (being the uncle, son, grandson, brother, nephew, or grand nephew of the patron), shall be presented, are rendered valid, subject to certain restrictions and provisions contained in the statute.

The authorities and arguments on the subject of general resignation bonds are fully collected by Mr. Bythewood in the notes to his *Precedents in Conveyancing*, vol. 3, p. 362, 1st ed.

Friday,
15th November.

PAGE, Esq., v. HOWARD.

(Reported, Caldecott, 228.)

Tuesday,
19th November.

GOODRIGHT, on the demise of HARE, v. BOARD and JONES (a).

Lord Bolingbroke, seised in fee, leased to *Stevens* for twenty-one years in 1765. In 1770 he granted an annuity to *Mrs. Hare*, and as a security demised the premises in the possession of *Stevens* to *Mrs. Hare* for ninety-nine years, if he should so long live, with a proviso that *Mrs. H.* should the next day redemise the premises to him for ninety-eight years and eleven months, at and under the said annuity. *Mrs. Hare* accordingly redemised. In 1773, *Lord B.* conveyed the premises to *Jones* in fee, without notice of the annuity. *Jones* was in the receipt of the rents from 1773, and in 1775 levied a fine, with proclamations, to himself in fee. The annuity became in arrear in 1774. Five years having passed from the time of the levying of the fine, Held, that *Mrs. Hare* was not barred, as her interest had never been divested.

THIS was an action of ejectment, tried at *Kingston*, before ASHURST, J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Lord Bolingbroke being seised in fee of the premises in question, by indenture of lease, dated the first of *March*, 1765, demised the same to *W. Stevens* for twenty-one years at the yearly rent of £110, which lease, by mesne assign-

(a) *S. C.*, but without the arguments of counsel. *Cruise* on *Fines*, 249, 2d ed.; 5 *Dig.* 238, 2d edit.

ments, became duly vested in the defendant *Board*. *Lord Bolingbroke* by bond, dated the twenty-fourth of *July*, 1770, with warrant of attorney to confess judgment, in consideration of £3000, became bound to the lessor of the plaintiff in £6000, conditioned for the payment to her of an annuity of £500 during his (*Lord Bolingbroke's*) life; and by indenture of the same date, in consideration of the said sum of £3000 as a further security for the annuity, demised the premises in question (among others) to the lessor of the plaintiff for ninety-nine years, if he should so long live, at a pepper-corn rent, with a proviso that the lessor of the plaintiff should on the next day redemise the premises to *Lord Bolingbroke* for ninety-eight years and eleven months, if he should so long live, at and under the said annuity of £500. The lessor of the plaintiff accordingly next day redemised the premises to *Lord Bolingbroke*. Before this action the bond, warrant of attorney, and indenture of demise and redemise were duly registered, according to the annuity act. By lease and release, dated the ninth and tenth of *March*, 1773, *Lord Bolingbroke*, for a fair and valuable consideration, conveyed the premises which had been demised to *Stevens*, together with the subsisting lease of the first of *March*, 1765, to the defendant *Jones*, in fee, who in *Trinity Term*, 1775, duly levied a fine of the premises, with proclamations, to himself, in fee. The lessor of the plaintiff was not party or privy to that fine. *Lord Bolingbroke* at the time of the execution of the lease of the first of *March*, 1765, was in the actual possession and receipt of the rents and profits of the estate in question, and under that lease *Stevens* entered. *Lord Bolingbroke* was also in the actual possession and receipt of the rents and profits of the premises at the time of the execution of the demise and redemise between him and the lessor of the plaintiff, and so continued until and at the time of the execution of the lease and release of the ninth and tenth of *March*, 1773. The defendant *Jones* has, ever since the execution of the indentures of lease and release, been in the actual possession of the rents and profits, and had no notice of the annuity granted to the lessor of the plaintiff till the present action. Five years from the time of levying the said fine, without any claim or entry on the part of the lessor of the plaintiff, expired at *Easter*, 1780. The present ejectment was brought in *Hilary Term*, 1782. The

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annuity to the lessor of the plaintiff has been in arrear from the twenty-fourth of *January*, 1774.

The case coming on for argument in *Trinity Term*, BULLER, J., said, The case is inaccurately stated. It does not appear whether Mrs. *Hare* gave notice to the tenant in possession at the time of the grant. If she did not, it ought to have been stated. The case must be amended in that point. It must also be stated that *Board* refused to pay the rent. The five years to bar run from the proclamations; that also is not stated.

On a later day in the same term, *Morgan* informed the Court that the parties had not been able to agree as to the amendments to be made in the case, and also that there was reason to believe that the defendant *Jones* had notice of the incumbrance, although the plaintiff's attorney had inadvertently admitted that he had not.

The case was argued in this term by *Morgan* for the plaintiff, and by *Rous* for the defendant.

*Morgan*.—There is no decision expressly in point, though many cases, decided on the effect of fines, will bear by analogy upon this case. At the time of the conveyance to *Jones*, Lord *Bolingbroke* had a term, with reversion for years to Mrs. *Hare*, reversion to himself in fee. On the conveyance to *Jones*, the latter took only the estate which Lord *Bolingbroke* had. Could Lord *Bolingbroke*, had he remained in possession, have avoided his own grant to Mrs. *Hare*? And can *Jones*, who claims under him, avoid it? The fine operates upon the lawful estate of the party who levied it, but it does not operate upon the estate of Mrs. *Hare*, which is not divested or turned to a right.

The situation of Mrs. *Hare* may be considered in four different views: 1. As lessee; 2. As lessor; 3. As mortgagee; and 4. As grantee of a rent-charge: and in whichever view the case is considered, it will appear that she is not barred. As a lessee, she is protected by the statute 21 H. 8, c. 15, that "farmers shall enjoy their leases against recoveries by feigned titles." This statute was passed with reference to recoveries, but a fine and non-claim have not a greater operation than a recovery. *Hurst v. Bourne* (b). 2. Considering Mrs. *Hare* as a lessor, on her redemise to Lord *Bolingbroke* the fine cannot operate. It is clear that

(b) *B. R.*, H. 1 *Anne*, Salk. 339.

if a lessee for years levies a fine without first making a feoffment, the fine will be void, for the purpose of making title by way of non-claim, by reason of the imbecility of the tenant's estate. *Carter v. Barnardiston* (c), *Fermor's case* (d).

3. As a mortgagee, Mrs. *Hare* cannot be affected by the fine, for the mortgagor is tenant at will as regards the mortgagee. *Corbet v. Stone* (e), *Freeman v. Barnes* (f).

[BULLER, J.—Are not those cases in which the mortgagee had possession of the title-deeds? As that fact is not found, will not Mrs. *Hare*, if a mortgagee, be a fraudulent mortgagee? The Court of *Chancery* always postpones the first mortgagee to the second where the title-deeds are not taken possession of.] 4. If Mrs. *Hare* be the grantee of a rent-charge, that charge being a thing incorporeal and collateral to the land, cannot be divested, and consequently she cannot be barred of it by the fine. *Smith v. Stapleton* (g), *Co. Litt.* 338, 2 *Bac. Ab.* 549. In any of these lights, therefore, Mrs. *Hare* is entitled to judgment.

The argument for the defendant being postponed, Lord MANSFIELD said, You should think of the following points: 1. Whether the assignee of *Lord Bolingbroke* can be in a better situation than *Lord Bolingbroke* himself. 2. Whether *Lord Bolingbroke* could have barred Mrs. *Hare* by a fine. 3. What Mrs. *Hare* is, whether lessee or lessor. She is not a mortgagee or grantee of a rent-charge. She has the estate only as a collateral security, and as long as the annuity is paid she has no notice of the estate being divested.

On the 15th of *November*, *Rous* was heard for the defendant.

There are three principles which govern all the cases respecting the power of fines in operating as a bar: 1. That where the title of the party is consistent with the estate which the fine was meant to protect, it shall not be barred; 2. That adverse interests are protected by claim within the

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(c) *Canc.*, *M.* 1718, 1 *P.* 1 *Vent.* 82. See *Hall dem. Wms.* 519.

(d) *Canc.*, *H.* 44 *Eliz.* 3 4; 5 *B. & A.* 687; 1 *Dowl. & R.* 340, *S. C.*; 5 *Cruise Dig.* Rep. 77 a.

(e) *C. B.*, *H.* 1651, *T. Raym.* 268, 2d ed. 147.

(g) *B. R.*, *E.* 15 *Eliz.* *Plow.* 435.

(f) *B. R.*, *T.* 22 *Car.* 2,

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proper time; 3. That interests in actual enjoyment are protected without claim.

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Mrs. *Hare's* lease was to commence in possession upon the failure of payment, which was in *January*, 1774. *Stevens*, the tenant, paid the rent to *Jones* from *March*, 1773, and the possession of *Stevens* was his possession. Whether the interest of Mrs. *Hare* was present or future is immaterial, because she has made no entry, and five years have elapsed; and an actual entry is necessary to avoid a fine. *Berrington v. Parkhurst* (h). The demise in ejectment must be subsequent to the entry, in order to avoid the fine, or it will not support the ejectment, unless the fine be *void*, which is not the case here. There is no interest to which a fine may not extend. It bars a rent-charge. *Conisbie's case* (i). It bars the interest of a devisee before entry, *Hulm v. Heylock* (k), *Mayor of London v. Alford* (l), of a tenant by *elegit* (m), and of a tenant for years. It was at one time contended, that a fine did not bar a lessee for years, and another question was made whether it barred a lessee who was out of possession; but in *Saffyn's case* (n) it was resolved, that though the lessee have never entered, yet that as he has an interest accompanied with a present ability to take the profits, such interest may be divested, and put to a right. From that time the doctrine has been uniformly recognised. *Dighton v. Greenville* (o). But where the interest of the party is consistent with that of the person levying the fine, it will not operate as a bar. Thus the interest of a copyholder is not barred by a fine levied by the lord (p). So in general, in the case of trust terms, a fine levied by *cestui que trust* will not bar the trustee; but where the term is not consistent with the estate taken under the fine, the latter will operate

(h) *B. R., H. 11 Geo. 2, fine until they have extended the lands, or pursued their rights in some other manner.*

2 *Str.* 1086.

(i) Cited *Carter*, 24.

(k) *B. R., M. 6 Car. 1, Cro. Essay on Fines*, 186.

*Car.* 200.

(l) *B. R., H. 15 Car. 1, W. Rep.* 123 b.

*Jones*, 452.

(m) *Shep. Touch.* 22. But the interest of tenants, by statute merchant, statute staple, or *elegit*, cannot be barred by a

(n) *C. B., E. 3 Jac. 1, 5*

*2 Vent.* 321.

(p) See *Doe dem. Tarrant v. Hellier, B. R., E. 29 Geo. 3, 3 T. R.* 173.

as a bar, as was held in *Freeman v. Barnes* (q), on the authority of *Iseham v. Morrice* (r). These cases show that if Lord Bolingbroke had levied a fine to confirm Mr. Jones's estate, it would have barred the term vested in Mrs. Hare, although after the default he was tenant at will to her. In the case of a fine levied by one of several joint tenants or copartners, it is a question of fact whether or not the possession is adverse. The question was so left to the jury by DE GREY, C. J., in *Scrutton v. Scrutton*, tried before him at the *Essex* assizes, and a new trial was moved for in this court and denied. Lord HARDWICKE also held the same in *Story v. Lady Windsor* (s). Whether the interest supposed to be affected by the fine is consistent with the title of him who levies it, is matter of evidence. All claims under the *conusor* must be consistent with the title, and protected by the fine. Upon this principle a mortgagee is not barred by the fine of the mortgagor. [Lord MANSFIELD.—Suppose the mortgagor conveys, and the purchaser levies the fine without notice?] That case would depend upon the question, whether the mortgagor had the freehold or not.

Applying these principles to the present case, it appears that Mrs. Hare had such an interest as was capable of being barred by a fine and non-claim, for she had a right to enter upon the land before the levying of the fine; and it also appears that her interest was not consistent with that of Mr. Jones, so as to avoid the effect of the fine. Nor was there any trust between her and Mr. Jones which might prevent the fine from operating. Jones stands in the place of Lord Bolingbroke only as the owner of the inheritance, and not as to any personal notices or trusts which bound Lord Bolingbroks. Both Jones and Mrs. Hare are *bonâ fide* purchasers, and to decide against Jones would be to decide that fines shall bar only in cases of wrongful seisin and possessions, where least of all they ought to bind. It is said that Lord Bolingbroke could convey no more than he had, and that the fine protects only the estate conveyed. This confounds the distinction between non-enlargement of estate and the bar created by the statute to dormant claims. If there has been any breach of trust between Lord Bolingbroke and Mrs. Hare, the remedy is a personal one against

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(q) B. R., T. 22 Car. 2,  
1 Sid. 458.

(r) C. B., E. 4 Car. 1, Cro.  
Car. 109.

(s) Canc. 2 Atk. 630.

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Lord Bolingbroke, as where a trustee sells to a *bonâ fide* purchaser without notice; but the present is a dry question of law. [Lord MANSFIELD.—Suppose both parties innocent, for if there is any fraud it changes the question totally: if there is not, is Mrs. *Hare*'s estate divested? For if *Lord Bolingbroke* had levied the fine to his own use there would have been no question.]

Morgan having desired time to reply, the case stood over; and now, in replying, he was stopped by the Court.

Lord MANSFIELD.—We have looked into all the cases, and no doubt remains with any of us. [His Lordship then stated the case.] On this case it appears that *Jones* and Mrs. *Hare* are both innocent. *Jones* is a *bonâ fide* purchaser for a valuable consideration, and Mrs. *Hare* is not alleged to have had any notice of the conveyance to *Jones*. There was no notoriety in that conveyance to apprise her of the fact; the lease to *Stevens* was still subsisting, and the payment of the rent by *Stevens* to *Jones*, instead of to *Lord Bolingbroke*, was not notorious in the country. At the time of the conveyance to *Jones*, in 1773, there were no arrears of the annuity due to Mrs. *Hare*, and she had at that time no right to come upon the land. Any laches on her part afterwards could not be *malâ fide* to *Jones*; so that it is a question of mere law between the parties whether Mrs. *Hare* is bound by the fine and non-claim. This question depends upon a rule of law founded in good sense, and to which I know of no exception, viz. that no fine shall bar an estate either in possession, reversion, or remainder, which is not divided and put to a right. This is the first resolution in *Margaret Podger's case* (†). This general rule is illustrated, explained, and applied in the books to a variety of cases. Thus a collateral interest, as a rent-charge, or right of common, cannot be barred by a fine. The authority in *Carter* is mistaken. The owner of a rent-charge levied a fine of the land, and it was held that the rent-charge was gone by the fine; but a rent-charge in a third person will not be barred by a fine and non-claim. The parties to a fine, or one of them, must be seised and possessed, adversely to the interest to be barred; if that interest be consistent with the seisin and possession, it is not barred. Now at the time of the conveyance to *Jones* there was no adverse

(†) *B. R., E. 10 Jac. 1, 9 Rep. 106a.*

possession by *Lord Bolingbroke*; there were no arrears of the annuity, and *Mrs. Hare* had no right of entry. At the time of the fine being levied, a year and a half's arrears of the annuity were due; but *Mrs. Hare* was not bound to resort to her remedy from the land; she had other security. Nor could she have entered into the possession of the land; she could only, under the statute 4 & 5 *Anne*, c. 16, have given notice to *Stevens*, the tenant, and have brought an action for the rent. In every shape it is most clear that her interest was not divested, or turned to a right, and remained after the fine just as it was before. The consequence is, that there must be

Judgment for the plaintiff.

Lord MANSFIELD informed Mr. *Rous*, for the satisfaction of his client, that the case had been much considered, and that the Judges had talked it over with many others.

PINLEY, Gent., one, &c. v. BAGNALL.

THIS was an action brought by the plaintiff, an attorney, for his fees. The declaration also contained a count on an account stated, and the defendant pleaded the general issue. At the trial, at *Warwick*, before GOULD, J., it appeared that the plaintiff had acted as clerk to Mr. *Mainwaring*, an attorney, who had become a bankrupt. The defendant had employed *Mainwaring* as his attorney, and had never applied personally to the plaintiff, otherwise than at *Mainwaring's* office, and in his absence. It appeared that, by agreement between *Mainwaring* and the plaintiff, the latter had all the benefit of the common law business; but of this agreement the defendant had no notice. The assignees of *Mainwaring* delivered a bill for the conveyancing and other business done by the defendant, and the plaintiff delivered a bill for the common law business. The plaintiff gave evidence of money paid by him to the use of the defendant, which, he insisted, might be given in evidence under the count on an account stated. The learned Judge before whom the cause was tried being of opinion that there was no evidence of a retainer of the plaintiff by the defendant, and that the money paid could not be given in evidence under the count on an account stated, nonsuited the plaintiff. A

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A., an attorney, was employed by B., another attorney, as his clerk, and it was agreed between them that A. should have the benefit of the common law business. C. applied at the office of B., and common law and other business was done for him there. In an action brought by A. against C. for the common law business, Held that there was evidence to go to the jury of a retainer of A. by C. *Semle*, that money paid cannot be given in evidence under a count, on an account stated.

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rule to show cause why the nonsuit should not be set aside and a new trial had, having been granted,

Balguy was heard in support of the rule.—There was, at all events, evidence of a retainer sufficient to go to the jury. The defendant applied to an office where the practice was for the plaintiff to have the benefit of the common law business. It was for the jury to say, whether that did not constitute a retainer. Under an *insimul computassent*, money paid, laid out, and expended, may be given in evidence. Originally, the practice at *Nisi Prius* was more strict, but in modern times it has been much relaxed. In the case of *Keymis v. Rees*, at the *Monmouth* Lent Assizes, 1779, before BULLER, J., the declaration contained counts for goods sold and delivered, and on an account stated. It appeared that a bull was sold for a certain sum, with an agreement to return six guineas of the price, if the animal was returned before a certain day. The bull was returned before the day, and an action brought for the six guineas, which BULLER, J., permitted to be given in evidence under the *insimul computassent*. So in *Thompson v. Rickards*, at the *Warwick* Summer Assizes, 1781, before GOULD, J., money had and received was given in evidence under the *insimul computassent*, on the ground, that any money for which the defendant was liable might be given in evidence under that count.

Dayrel, contra.

Lord MANSFIELD.—The defendant applying at the office must be supposed to employ the persons at that office, upon the terms on which business is there done. This was proper for the consideration of the jury, and the nonsuit was wrong. As to the second point, I am of opinion that money laid out could not be given in evidence under an *insimul computassent*.

BULLER, *Justice*.—Whenever there is a liquidated debt, it may be given in evidence under an account stated. That was the ground of my decision at *Monmouth*, which perhaps was a strong one; but I think the Court should go even on slight evidence to prevent a nonsuit on so formal an objection. There was evidence of an agreement to take the specific sum of six guineas if the bull should be returned, and that, therefore, might be considered as a sum admitted to be due. Here, too, there is a precise sum; but the doubt

is, whether there was any assent (a). Upon the first point, I think there is evidence to go to a jury. The action is on an attorney's bill, which was delivered, and no objection made to it; at least none appears, and I should think that alone sufficient.

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Rule absolute.

(a) An acknowledgement or assent on the part of the defendant seems to be absolutely essential. See *Tucker v. Barrow*, B. R., H. 8 & 9 G. 4, 7 B. & C. 624; 1 *Mon. & R.* 518, S. C. See also *Knowles v. Michel*, B. R., H. 51 G. 3, 13 *East*, 250; *Higmore v. Primrose*, B. R., E. 56 G. 3, 5 *M. & S.* 68.

FOLKES, Bart., v. CHADD and Others (a).

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THE trustees for the preservation of Wells harbour being of opinion, that a bank which had been erected above twenty years, for the purpose of preventing the sea overflowing some meadows which had descended to the plaintiff, contributed to the choking and filling up of that harbour, by stopping the back-water, threatened to cut it down, on which the plaintiff applied to the Court of Chancery for an injunction. That Court thereupon directed an action of trespass to be brought against the defendants for cutting the bank, directing the trespass to be admitted at the trial; and that the only point in dispute should be, whether the mischief which the bank did to the harbour was a justification for the cutting, that thus the merits of the question might be decided by a jury. The action was first tried at the last Lent Assizes for the county of Norfolk, when the evidence of a Mr. Milne, an engineer, was received, as to what, in his opinion, was the cause of the decay of the harbour, and to show that, in his judgment, the bank was not the occasion of it. The plaintiff, on that trial, obtained a verdict, and in Easter Term last a new trial was granted, on the ground that the defendants were surprised by the doctrine and reasoning of Mr. Milne, and the parties were directed to print and deliver over to the opposite side the opinions and reasonings of the engineers whom they meant to produce on the next trial, so that both sides might be prepared to answer them. Accordingly they went to trial at the last

In an action of trespass for cutting a bank, where the question is, whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men, as to the effect of such an embankment upon the harbour, are admissible evidence; and evidence may also be given, that other harbours, similarly situated, where there are no embankments, have begun to be choked and filled up.

(a) S. C. cited 4 *T. R.* 498; 1 *Phill. Ev.* 276, 6th ed.

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Summer Assizes, when the defendants offered evidence to show, that other harbours, on the same coast, similarly situated, where there were no embankments, had begun to fill up and to be choked about the same time as *Wells* harbour. They also called Mr. *Smeaton*, an eminent engineer, to show that, in his opinion, the bank was not the cause of the mischief, and that the cutting the bank would not remove it. The receiving this evidence was objected to, as the inquiring into the site of other harbours was introducing a multiplicity of facts which the parties were not prepared to meet. It was also objected that the evidence of Mr. *Smeaton* was matter of opinion, which could be no foundation for the verdict of the jury, which was to be built entirely on facts, and not on opinions. *GOULD, J.*, who tried the cause, rejected the evidence. *Partridge* having obtained a rule for a new trial, on the ground that the Judge had improperly rejected the evidence,

Harding, Cole, Graham, and Le Blanc showed cause, and urged the arguments made use of at the trial in support of the objection. They insisted also, that if the bank originally caused the mischief, the defendants might cut it down, though it would not restore the harbour.

Wallace, Partridge, Joddrel, and Sayer having been heard in support of the rule,

Lord MANSFIELD delivered the opinion of the Court.— This case comes before the Court under the same circumstances as if it were an indictment for the continuance of a nuisance, and it is a question, therefore, whether the demolition of the bank would contribute to restore the harbour. The Court will not compel the removal of a nuisance where it does not appear to be a prejudice, but will set a small fine. Nor would the Court of *Chancery*, in this case, compel the pulling down of the bank for a damage which might be compensated by a shilling.

The facts in this case are not disputed. In 1758 the bank was erected, and soon afterwards the harbour went to decay. The question is, to what has this decay been owing? The defendant says, to this bank. Why? Because it prevents the back-water. That is matter of opinion:—the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause; nobody thought that it would produce this mischief when the bank was erected. The commissioners themselves look on for above twenty

years, until a property has been acquired which would be good by the statute of limitations. It is a matter of judgment, what has hurt the harbour. The plaintiff says that the bank was not the occasion of it. On the first trial, the evidence of Mr. *Milne*, who has constructed harbours, and observed the effects of different causes operating upon them, was received; and it never entered into the head of any man at the bar that it was improper; nor did the Chief Baron, who tried the cause, think so. On the motion for the new trial, the receiving Mr. *Milne's* evidence was not objected to as improper; but it was moved for on the ground of that evidence being a surprise; and the ground was material, for, in matters of science, the reasonings of men of science can only be answered by men of science. The Court considering the evidence as proper, directed the opinions to be printed, and to be exchanged. Under the persuasion of this being right, the parties go down to trial again, and Mr. *Smeaton* is called. A confusion now arises from a misapplication of terms. It is objected that Mr. *Smeaton* is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. *Smeaton* understands the construction of harbours, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskillfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the *Trinity House*. I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. Hand-writing is proved every day by opinion; and for false evidence on such questions a man may be indicted for perjury. Many nice questions may arise as to forgery, and as to the impressions of seals; whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken. I have myself received the opinion of Mr. *Smeaton* respecting mills, as a matter of science. The cause

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of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr. *Sneaton* alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence. As to the evidence respecting the situation of other harbours on the same coast, we think that if there were no embankments it was admissible in illustration of Mr. *Sneaton's* opinion; but as to harbours in which there were embankments, we think it was improper, since *litem lite resolvit*.

Rule absolute (b).

(b) This may be regarded as the principal case on the admissibility of matter of opinion. It has been followed and confirmed by a variety of similar decisions. In *Thornton v. Royal Exchange Assurance Company, Peake, N. P. C. 25*, Lord KENYON admitted the evidence of a ship-builder on a question of sea-worthiness, though he had not been present at the survey. And, in a subsequent case, his lordship received the evidence of underwriters in explanation of the terms of a policy. *Chaurand v. Angerstein, Id. p. 43*. See also *Berthon v. Loughman, 2 Stark. N. P. C. 258*; but see *Durrell v. Bederley, Holt, N. P. C. 286*. So, a person versed in the laws of a foreign country may give evidence as to what in his opinion would, according to the law of that country, be the effect of certain facts. *R. v. Wakefield, Cur. Hullock, B., Murray's ed. p. 238*; *Chaurand v. Angerstein, Peake, N. P. C. 44*. So, in prosecutions for murder, medical men are allowed to state their opinions, whether the wounds described by the witnesses were likely to have occasioned death. In the case of *R. v. Wright*, who was tried for murder, the defence being insanity, the twelve judges were

unanimous in opinion, that a witness of medical skill might be asked, whether, in his judgment, such and such appearances were symptoms of insanity; and whether a long fast followed by a draught of strong liquor was likely to produce a paroxysm of that disorder in a person subject to it. But several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz. whether, from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. *R. v. Wright, Russ. & Ry. Cr. Ca. R. 456*; 2 *Russell on Crimes*, 623, 2d edit. The Scotch law is the same as our own on this subject. "Professional men, when examined on the subject of their art or science, are of necessity allowed to state their opinions, and to speak to the best of their skill and judgment. In homicides the *corpus delicti* is, in many cases, established by no other evidence." *Burnet on the Criminal Law of Scotland*, p. 458.

In the principal case, Lord MANSFIELD says, "Hand-writing is proved every day by opinion." In *Revett v. Bra-*

law, B. R., H. 32 G. 3, 4 T. R. 497, two clerks from the *Post-office* accustomed to inspect franks, and to detect forgeries, were allowed to give evidence of their opinion as to the genuineness of the hand-writing to a will; and similar evidence was admitted in *R. v. Cator*, by HOTHAM, *B. 4 Esp. N. P. C. 145*; and in *Birch v. Crewe*, by ABBOTT, *J.*, cited *5 B. & A. 332*. The authority of these decisions, however, has been much shaken by the case of

Cary v. Pitt, Peake Ev. Appendix, 84, 4th ed., in which Lord KENYON rejected such evidence; and by the case of *Gurney v. Langlands, B. R., H. 2 G. 4, 5 B. & A. 330*, in which the judges expressed great doubts as to the admissibility of such evidence, and observed that, at all events, it was entitled to no weight, and was much too loose to be the foundation of a judicial decision either by judges or juries.

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COURT v. MARTINEAU.

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THIS was an action by an underwriter to recover back the amount of a loss paid by him on a policy of insurance, which, as it was contended, was avoided by concealment. The cause was tried at *Guildhall*, before BULLER, *J.*, who, thinking the concealment material, directed the jury to find a verdict for the plaintiff. A new trial was afterwards granted; and Lord MANSFIELD thinking the transaction fair, and the concealment not material, a verdict was found for the defendant. The following appeared to be the circumstances of the case.

The *Essex*, of *Liverpool*, took, off the coast of *Ireland*, a ship and brig from *St. Eustatius* to *Amsterdam*. The owners of the *Essex*, at *Liverpool*, ordered insurance on the prizes to be made in *London*. On *Sunday* night, the defendant, who was a part owner, sent an express to his broker with an account of the arrival of the brig, but expressing great fears about the ship, and ordering further insurance on her. He added, that if she arrived by *Monday* morning he would send another express; and he enclosed a letter to be shown to the underwriters, which he dated on the *Saturday*. The express reached the broker on *Tuesday*, and on *Wednesday*, not having received the second express, he got the policy underwritten by several persons, and amongst the rest by the plaintiff, at a premium of fifty guineas per

Two prizes being carried into *Liverpool*, the captor gave orders to effect an insurance on them in *London*. One of the prizes arriving on *Sunday*, the owner sent a despatch to his agent in *London*, stating that fact, and expressing fears as to the other ship. The express reached the broker on *Tuesday*, and on that day an entry was made at *Lloyd's* of the arrival of the vessel at *Liverpool*. On *Wednesday* the captor's agent effected an insurance on the other vessel at a premium of fifty guineas per cent. without communicating to the underwriters the fact of the express. Held,

that this was not a concealment which vitiated the policy.

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cent. The non-arrival on *Sunday* night could not be known in *London* by the post till *Wednesday* noon, after the plaintiff had underwritten. On the *Tuesday* an entry was made in *Lloyd's* books, by the direction of the broker, that the brig had arrived, but that the ship had not. The broker did not communicate the fact of the express.

A rule for a new trial having been granted,
Lee showed cause.

Wallace, Wilson, and Law, contra.—The underwriter supposed that the ship was not arrived on *Saturday*, or on *Sunday* at the latest, and that there was no later intelligence. The broker knew that she was not arrived on *Monday*. This varied the risk materially; as, in these cases, a day, or even an hour, may make a great difference. The underwriter calculated on the probability that the ship might have arrived between the *Saturday* or *Sunday* and the time of underwriting; but that calculation ought to have been formed upon different facts, and those facts were in the knowledge of the broker. If the concealment is at all material, so as to vary the risk or advantage in any degree, it is sufficient to avoid the policy; for, as to all material circumstances, the knowledge must be exactly equal on both sides. [The policy being "from sea to *Liverpool*," Lord MANSFIELD asked, whether, on such a policy, if the loss happened before the time of underwriting, though not known, there would be a recovery? He was answered, that there would; and that in most cases of policies on ships abroad, the event is over before the insurance is made.]

The Court having taken time to consider,

Lord MANSFIELD delivered the judgment of the Court.—On the *Wednesday*, before the post came in, the plaintiff underwrote this policy at *fifty guineas per cent.* This was emphatically informing the plaintiff that the ship had not arrived, and that the defendant did not believe she had arrived at that moment. Under any other circumstances such a premium could not have been given. The plaintiff alleges that he has since discovered that the broker received a letter by express from *Liverpool* despatched on the *Sunday*, with information that the ship had not arrived, and that the defendant feared she might be retaken. The letter also stated, that if she arrived on the *Monday*, the defendant would send another express. We lay out of our consideration the ostensible letter intended to be exhibited to the underwriters, for

in fact it was never shown to them. The sole objection therefore is, that the broker did not communicate the fact of the express. Now it must have been known, that a merchant at *Liverpool* so circumstanced would send an express upon the ship's arrival, since the whole of the premium paid after that event would be thrown away. If the underwriter had wished to know by what means the broker acquired his information that the ship had not arrived, he should have made inquiry; but he waived the inquiry by putting no questions to him, though they naturally arose from the subject. By the course of the post from *Liverpool*, the underwriter must have known that the entry of *Tuesday* at *Lloyd's* did not arrive by post. The broker said nothing to mislead. We are all of opinion that there was no concealment, and that it was owing to himself that the underwriter did not receive the information which he now complains was withheld from him.

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Judgment for the defendant (a).

(a) There appear to be only two circumstances in this case the concealment of which could be material, viz. the non-arrival of the vessel insured, and the arrival of the brig captured at the same time. The first objection was answered by the observation of Lord MANSFIELD, that there was, in fact, the strongest assertion of the non-arrival, by the payment of fifty guineas per cent.; and that if the underwriter was desirous of ascertaining the broker's means of knowledge, it was his duty to make inquiries. So it has been held, that the mere concealment of the fact of a ship having sailed is not material; and that if the under-

writer wanted to know whether she had sailed, he ought to have inquired. *Fort v. Lee*, C. B., H. 51 Geo. 3, 3 Taunt. 381; and see *Forley v. Molin*, C. B., E. 54 G. 3, 5 Taunt. 430; 1 Marsh. 117, S. C.; *sed vide ante*, p. 41(n). With regard to the second question, the concealment would seem to be material. *Kirby v. Smith*, B. R., T. 58 G. 3, 1 B. & A. 672; but the underwriter had the means of knowledge in his own power, in consequence of the entry at *Lloyd's*. *Frere v. Woodhouse*, Holt's N. P. C. 572; and see *Littledale v. Dixon*, C. B., H. 45 G. 3, 1 Bos. & Pul. N. R. 151.

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JOYCE v. WILLIAMSON (a).

Action on a bottomry bond containing a clause, that if the ship should be taken by the enemy, &c. the bond should be void. The ship was captured and recaptured, and afterwards arrived at her destination, and earned her freight. Held, that the obligee was entitled to recover upon the bond.

There is no average or salvage on a bottomry bond.

THIS was an action on a bottomry bond for £600 and upwards, which contained a clause, that if the ship should be taken by the enemy, cast away, miscarry, or be lost, before her safe arrival at *New York*, the bond should be void. The defendant pleaded, 1. *Non est factum*; 2. That the ship did not arrive at *New York*, her port of destination; and, 3. That the ship was captured. Issue was joined upon the two first pleas, and to the last the plaintiff replied a recapture. On the trial, the following appeared to be the facts of the case.

The voyage was from the *Tagus* to *New York*. The ship was taken, on her passage to *New York*, by a privateer; and afterwards retaken and carried to *Halifax*, where part of the cargo was sold for salvage and repairs. The amount of the latter was very considerable. The vessel afterwards arrived at *New York* with the remainder of her cargo on board. The ship and freight were then worth the sum in the bond, but not worth that sum together with what had been laid out in repairs. A verdict having been found for the plaintiff, *Haworth* obtained a rule *nisi* for a new trial.

Wallace, Lee, and Piggot showed cause.—This was not a total loss, but only an interruption of the voyage; and the subject-matter remaining, the money must be paid. There is no salvage or average on a bottomry bond. It is in the nature of a wager on the ship's arrival, and here the ship has arrived.

Haworth and *Baldwin*, *contra*.—The lender looked to the vessel and the freight which she should make as his only security. The vessel being taken and plundered, and a great part of her cargo lost, the security was destroyed, notwithstanding the recapture. On her arrival at *Halifax* after recapture, the vessel was worth no more than £225; and in order to fit her to proceed on her voyage to *New York*, £500 was laid out upon her. Suppose *New York* were in the hands of the enemy, and the vessel carried in there, could it be said that she had completed her voyage? The voyage from *Halifax* to *New York* was a new voyage,

(a) *S. C. Park Ins.* 563, 6th ed.

undertaken for the benefit of the underwriters. It was necessary to aver in the declaration, that the ship and freight, on the arrival, were worth the sum in the bond, which was not the fact. [Lord MANSFIELD.—What obstruction would be sufficient to put an end to the bond?] Every obstruction that would make the ship unable to pay. [BULLER, J.—That would be going too far; but I doubt whether the case is not within the provisions of the bond, which says, “loss, capture, miscarriage, or being cast away.”]

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Cur. adv. vult.

Lord MANSFIELD delivered the judgment of the Court. —This was an action of debt on a bottomry bond, to pay the money therein mentioned within a certain time after the safe arrival of the vessel at *New York*. The bond contained a clause, that if the ship should be taken by the enemy, cast away, miscarry, or be lost, before her safe arrival at *New York*, the bond should be void. The ship was taken, in the course of her voyage, by two *American* privateers, kept by them above a month, and plundered. She was then retaken, carried into *Halifax*, restored, and salvage paid. A considerable sum of money was laid out in repairing her. She proceeded to *New York*, and arrived there. She earned her freight, but the value of the ship at *New York* was not sufficient to answer the bond. It was admitted, that on a bottomry bond there is no average or salvage; but it was contended that the case came within the words of the clause, making the bond void in case of capture by the enemy. But, on consideration, we are all of opinion, that the taking by the enemy there contemplated does not mean merely a temporary taking, which is only an obstruction. To come within the clause, it must be such a taking as constitutes the loss of the ship, and which would amount, between the insurer and the insured, to a total loss. Here there was no such total loss. The vessel earned her freight, and is safe. Either way it is a hardship; but the law allows no average or salvage on bottomry bonds, and the rule must therefore be discharged.

Rule discharged.

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21st Nov.ANTHON *v.* FISHER (a).

Action on a ransom-bill containing a clause, that the bill should be enforced though the hostage should die, or the vessel be retaken. Plea, that before the captor got into port he was taken, with the hostage and ransom-bill on board; and being required to deliver up all papers, fraudulently did not deliver up the ransom-bill.—Demurrer. Held, by Lord Mansfield, that the plea was bad; but, by the other Justices, that the Court had no jurisdiction, this being a matter of prize, cognizable by the court of Admiralty.

THIS was an action on a ransom-bill containing the same clause as in *Cornu v. Blackburne* (b), relative to the payment of ransom, though the hostage should die, or the vessel, with the hostage on board, be captured. The defendant pleaded, 1. The *general issue*; 2. That the privateer, soon after the capture, and before it got into any *French* port, was taken with the hostage and ransom-bill on board, when the plaintiff was required to deliver up all the papers and ransom-bills on board, but that he fraudulently and deceitfully did not deliver up the ransom-bill upon which the action was brought. Demurrer to the second plea, and cause assigned that it amounted to the general issue. The case came on to be argued in *Easter Term*.

Law, for the plaintiff.—The general question in this case differs very little from that in *Cornu v. Blackburne*, which, with *Ricord v. Bettenham* (c), is the only case on ransom-bills. The sole difference between this case and *Cornu v. Blackburne* is, that here the ransom-bill is stated to have been on board, and that the captain, on being asked, refused to deliver it up, saying, fraudulently, that he had delivered up all papers. To make it fraudulent, some duty must be shown in the *French* captain to deliver up his property. But it is said by *Grotius* (d), “that if a prisoner can conceal any part of his property the captor does not acquire that portion, for he is, in fact, never in possession of it. Whence,” he continues, “it follows, that a prisoner may avail himself, to pay his ransom, of property which he has succeeded in concealing.” But supposing this concealment fraudulent, yet the same fraud existed in *Cornu v. Blackburne*; for the obligation to deliver up the property does not depend upon the demand; and in that case the Court determined that there was no such obligation. Was lenity the consideration for giving up the bill? The captor has no

(a) *S. C.* cited *ante*, vol. ii. 1734; 1 *Blacks.* 563, *S. C.* p. 649 (n).

(b) *B. R.*, *F.* 21 *G.* 3, *ante*, vol. ii. p. 641.

(c) *B. R.*, *M.* 6 *G.* 3, 3 *Burr.*

(d) *Lib.* 3, c. 21, s. 28; see also *Burlamaqui's Principles of Politic Law*, by Nugent, p. 302.

right to exercise force and cruelty. If he has a claim upon the property, he has none upon the veracity, of the prisoner.

Baldwin, contra.—The present case differs in some material circumstances from *Cornu v. Blackburne*. In that case, which was argued upon a case stated, great stress was laid upon the clause in the ransom-bill respecting the capture of the hostage. It was also stated there that the privateer had a commission from the *French* king, a fact which does not appear in the declaration in this case. Now, in order to maintain this action, it is necessary to show that the first capture was a legal capture, and the declaration ought to have shown that the plaintiff had a commission from the *French* king. *Molloy, b. 1, c. 3*. The plea charges the plaintiff with fraud, and the demurrer admits the fraud; the Court, therefore, will not render the plaintiff any assistance. It is said, on the other side, that there could be no consideration for the plaintiff's delivering up the ransom-bill. The captor had a right to search him; and if he forbore and treated him civilly, it was a good consideration for his promise to deliver up all papers. In *Cornu v. Blackburne* it does not appear that the ransom-bill was taken. In the present case it was brought into port. The stipulation is, that the ransom-bill shall stand good in case the vessel with the hostage on board shall be taken, but not in case both the hostage and bill shall be taken; and it is admitted by the demurrer, that the vessel, hostage, and bill, were all taken. With regard to the passage cited from *Grotius*, it does not appear that the prisoner had been required to deliver up the property.

Law, in reply.—It is said that it does not appear that the privateer had a commission; but it is stated that the captain was a subject of the *French* king, and that he was captain of a privateer, which is sufficient. The demurrer does not admit the fraud. It admits the fact, but not the epithets. [Lord MANSFIELD.—In *Ricord v. Bettenham*, the question was, whether the hostage was the principal, or only a collateral security.]

The case standing over, Lord MANSFIELD, on a future day, said, I wish this case to be spoken to by Civilians. We can have no light from our own law. I have been looking into a *French* Commentary on *Colbert's Ordon-*

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nance (e), and I find, that if the privateer is taken with both the hostage and bill on board, the ransom-bill is discharged, because both together represent the ship. If the bill is sent on shore, and the hostage taken, still the ransom-bill is discharged; but if the hostage dies or deserts, it is not. At that time, however, there was no clause in the bill like the present, which does not, indeed, provide against the ransom-bill being taken, but only for the hostage dying, deserting, or being taken on board. I wish to know if any case has occurred in *France* of a ransom-bill on board, but, by fraud or accident, not found; and also where, and on what account, the clause was added.

Wood said, that it was introduced at the beginning of the present war, by the people of *Boston*, in *New England*, and was adopted by *France*.

In *Trinity Term* the case was argued by *Dr. Wynne* for the plaintiff, and by *Dr. Scott* for the defendant.

Dr. Wynne.—The facts of the dismissal of the ransomed ship, and of her arrival at her destination, are admitted; but the defendant pleads that the *French* privateer was taken with the ransom-bill on board, and that the plaintiff, her captain, was required to deliver up all papers, but that he fraudulently did not deliver up the ransom-bill. This plea admits the jurisdiction of the Court, and is to be taken as the defendant's whole defence. To determine the question raised by this plea, it will be necessary to inquire into the contract of ransom, whether it is a contract of a distinct nature, or whether it is to be ranked with other contracts. It is, in fact, a mere contract of bargain and sale. During war, capture in general vests a property in the captor; and though there may be circumstances rendering the seizure illegal, as where the property is protected by a pass, in a neutral port, &c., yet here it is unnecessary to prove that the seizure was unaffected by any of those circumstances; for the ransom admits that the seizure was lawful according to the laws of war. The property having thus vested in the captor, he contracts, not as captor, but as vendor. The contract, then, stands thus:—The captor sells the ship captured, with a stipulation that she shall be free from a second

(e) *Nouveau Commentaire du Mois d'Août*, 1681. *Par sur l'Ordonnance de la Marine* M. R. J. Valin. 1766.

capture, as appears by the ordonnance of 1706, Art. 6 (f), and receives in return the ransom-bill; and equal justice requires that the bill also should be protected from capture. To hold otherwise would be a great hardship; and such a principle is not to be found either in the civil law or in any writer on the law of nations. A circumstance has been relied on which is only accidental, and not essential to the contract, viz. that hostages are commonly taken. It is said, in *Molloy* (g), "If hostages are taken, he that gives them is freed from his faith; for that, in receiving hostages, he that receives them hath relinquished the assurance which he hath in the faith of him who gave them." No authority for this position is cited, but it is unnecessary to deny it, for the hostages here spoken of are clearly hostages given by one state to another. Between states it is true; for war is the only appeal in case of the contract being broken, and therefore hostages must be resorted to. But it is otherwise with regard to individuals, where the giving of hostages rather resembles a pledge, which does not exclude any other remedy upon the contract. *South Sea Company v. Duncombe* (h), *Anon* (i). The rule is the same in the civil law. *Dig.* 12, b. 1, tit. *de rebus creditis*. It may be said that the contract of ransom being between enemies, the parties cannot resort to courts of justice, and are in the same situation as independent states; but that is a fallacy, since, for the purposes of this contract, they cease to be enemies. The contract was legal (k), and must be recognised as such in the courts of both countries, though *English* privateers are prohibited from ransom by the prize-act, and though, by a statute passed since this transaction, and therefore not affecting it, merchantmen are forbidden to ransom. No writer on the law of nations treats this contract as of a special nature, nor is it laid down that either hostages or ransom-bills are essential parts of it. According to the law of nations, nothing is necessary but the agreement and the delivery in pursuance of it.

There is nothing in the common law of *England* contrary

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(f) See *Valin*, vol. ii. p. 286.

(g) *B.* 1, c. 8, s. 7.

(h) *B. R.*, M. 5 G. 2, 2 *Str.* 919.

(i) *B. R.*, E. 5 W. & M., *Salk.* 523.

(k) As to contracts made with an enemy by private persons, see *Burlamaqui's Principles of Politic Law*, by Nugent, p. 347.

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to such a contract. The first statute restraining the power of ransoming is the 22 Geo. 3, c. 25 (l). Previously to that act instructions were issued, in 1744 and 1756, to privateers and men-of-war, to report to the *Admiralty* the ransom and the causes of ransom, which, it was directed, should not take place without necessity. Formerly ransoms were not uncommon; and in the *Admiralty* books two cases are mentioned: that of the *Margaret of Nantz*, and that of *L'Heureuse Marie*. In the former case a *French* ship was taken and ransomed, and afterwards taken again (for a ransom does not necessarily protect to the ship's port). The second captor proceeding to condemnation, the first captor appeared, and produced his ransom-bill. The decree was, that the second captor should, out of the proceeds, pay to the first captor the amount of the ransom-bill. From this it may be inferred that the interest of the captor is a permanent interest. It must be admitted that no case is to be found where the foreign ransomer has proceeded to recover his ransom in the court of *Admiralty*, though suits have been frequently instituted for salvage on recapture. These have been brought on the recapture of the hostage, which is a benefit to the owners in this manner. The hostage has a demand against, and may sue, the owners for the loss of his liberty, and therefore the recovery of his liberty by recapture is a benefit to the owners (m). In the case of the *George and Nelly* (n), (10th February, 1780), where a ship had been ransomed and a hostage taken, and the hostage had been retaken, the recaptor instituted a suit for salvage for the recapture of the hostage. The owners replied, that the ransom-bill did not come to the possession of the owner or of the hostage, and that it was not known what had become of it. It was suggested in argument, that the owner might make use of the ransom-bill. The judge condemned the owner in one-eighth of the ransom for the recapture of the hostage. The hostage, if taken to *France*, might have instituted a suit there against the owners for his delivery. It is too much to infer from this sentence that a suit might not have been instituted on the ransom-bill.

(l) See also 33 G. 3, c. 66; *Parsons v. Scott*, C. B., E. 50
43 G. 3, c. 160, s. 34 & 35; G. 3, 2 Taunt, 363.
and 45 G. 3, c. 72, s. 16 & 17; (m) See *Valin*, vol. ii. p. 287.
Abbott on Shipping, 347, 5th ed.; (n) Cited *ante*, vol. ii. p. 646.

The first case in this court is that of *Ricord v. Bottenham*, which, as far as it goes, proves that an enemy may sue on a ransom-bill. The next case was that of *Cornu v. Blackburne*, the facts of which, as will presently be shown, do not, in any material point, vary from this. In the court of *Admiralty*, the question is *res integra*.

It is material to consider the law of *France* as to ransoms. *Valin* published his *Treatise on Marine Ordonnances* in 1766. From that work it appears that the first of those ordinances relative to ransoms was made in 1692 (o). Since that period various regulations have been introduced, chiefly with a view to prevent collusion between the *French* captors and their captures. A prescribed time is laid down within which the vessel shall arrive, otherwise the ransom is declared illegal. But no regulation is made respecting hostages or ransom-bills; and no inference can be drawn, that the ransom-bill is to be void on recapture. *Valin* does, indeed, give it as his own opinion that it shall, because the hostage and ransom-bill represent the ship and cargo; but no authority is given in support of this opinion, and the reason offered, when examined, will appear to be insufficient. He himself terms it a *pledge*; and if it be so, though the pledge be lost, the right in respect of which it was given remains. But there is an express condition here which renders this general reasoning unnecessary. There is a covenant in the bill that the owner shall pay the money, although the hostage should be retaken. The taking of the bill is immaterial, and it is omitted because it is immaterial, the hostage being of infinitely greater value. There might be ground for saying that the capture of the hostage should avoid the contract; and that, therefore, is provided for by special stipulation.

There is a suggestion of fraud in this case, in which it is said to differ from *Cornu v. Blackburne*. It is stated in the plea that the plaintiff fraudulently concealed the ransom-bill, and it is said that he shall not be allowed to take advantage of his own fraud. There are, however, some cases in which a man is permitted to take advantage of his own wrong, as in war. Here the captain of the privateer and of the *Aurora* were enemies throughout. By striking, the enemy only submits; but there is no obligation, either na-

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(o) *Valin*, vol. ii. p. 282.

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tural or moral, which makes it incumbent upon the conquered to deliver up their property. Nothing can be stronger on this point than the authority of *Grotius* (p). From this it appears clearly that concealment is not fatal. But then it is said that here there is a fraudulent concealment. The answer is, that the captor had no right to require or to expect a true declaration. The parties were not *pares*. Could he who concealed be punished for the concealment? *Heineccius, Prælectiones upon Grotius*, l. 3, c. 18. In the contract of ransom, on the contrary, the parties acted *tanquam amici et pares*, though under no obligation to do so; and it would be the greatest injustice if, having so acted, the Court here should refuse to enforce the contract.

Dr. *Scott, contra*.—The first objection on behalf of the defendant is, that this is a question of prize; and questions of prize or no prize belong to the *Admiralty* jurisdiction. It would have been more regular to have pleaded this matter in abatement; but it is of such a nature, that even yet advantage may be taken of it. The original act of ransom is strictly founded in war, and involves the question of prize or no prize, and cannot be resolved into a transaction of bargain and sale. To constitute such a contract there must be on the one side a right of property, and on the other a free power to purchase; but the capture does not alone vest the property. Various circumstances are necessary to complete the title of the captor;—in some cases condemnation—and, according to the law of some countries, twenty-four hours' possession. Nor has the captured free power to purchase, since, in general, a purchase from enemies is prohibited. Usually, at the commencement of a war, proclamations are issued forbidding such transactions. A military war and a commercial peace cannot co-exist. The capture is primarily an act of war; and the parties cannot immediately enter into a civil contract, as if the relation of public enemies did not exist between them. Ransom, then, is a contract *sui generis*, a military contract entered into between enemies. The rights of war are not abandoned, but are merely exercised in a different manner. According to the *French* law, ransom is considered to be a question of prize, and comes under the cognizance of the *Admiralty* courts; and there is every reason to regard it, in the *English*

law also, as a question of prize, since it can only arise on recapture. In the case of the *Dunkirk*, in 1779, the ransom-bill was found on board. The proctor appeared, and prayed that it might be delivered up to found monitions on, and condemnation. This was in the *Prize* court. Cases have occurred, during the present war, in the *Instance* court, because in those cases the ransom-bills were not found, but only the hostages. Salvage, however, was decreed, as in the *Prize* court. In the course of the year 1758, the case of the *Antigua* merchant occurred. There a privateer was taken with the ransom-bill and hostage on board. Monition and sentence, that the hostage and ransom-bill were rightly retaken, and the captain was ordered to discover the owners. A bill was then filed in the court of *Chancery* for a better discovery, but was dismissed on the ground that the cause belonged to the court of *Admiralty*; and on its coming back to that court it was so admitted. On these grounds it is submitted that this is a subject of *Admiralty* jurisdiction.

But if this Court should be of opinion that they have jurisdiction, then the argument of the general question presents three points: 1. Whether a capture of the vessel with the ransom-bill found on board extinguishes the right of the first captor; 2. If so, whether the taking with the bill on board, but secreted, has the same effect; and, 3. Whether that effect can be defeated by a special agreement between the parties.

1. The right of killing an enemy was converted, by the Roman law, into a right to his service. But the power over the liberty of a prisoner would be of little avail without the practice of ransom. The ransom of moveables is of later introduction, and was probably copied from the practices of freebooters. Capture undoubtedly vests all corporeal property in the captor. *Grotius*, b. 3, c. 8, s. 4; *Puffendorf*, b. 8, c. 6, s. 22; *Vattel*, b. 3, c. 18, s. 196. So, on the taking of *Naples* by *Charles VIII.*; that sovereign gave to his officers the bonds of the inhabitants. A ransom-bill, being a contract founded in violence, may, in like manner, be transferred by violence. It is transferred in the same way that it was created. A ransom-bill may be assigned with consent; but the enemy who takes it does not need such an assignment. He takes it *jure belli*. It is said that the ransom-bill is not the contract itself, but only evidence of the contract. It is indeed evidence, but it is some-

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thing more. Until reduced to writing, it was not assignable with consent; when reduced to writing, it is also assignable by violence. A bill of exchange, in the same manner, is both evidence of a contract and something more.

The recaptor might undoubtedly bring his action on the ransom-bill, as standing in the place of the first captor, were he not prohibited by domestic regulations. The state, in favour to the former owner, and by analogy to the case of a specific recapture, reduces his claim to a salvage. This is no hardship on the captor, for the ransom-bill only runs the same risk which the vessel itself must have run had no bill been taken. On these grounds it is contended that the right of the captor is extinguished by the capture of the ransom-bill, not because it is annulled, but because it is transferred.

With regard to the provisions of positive law, little is to be found on the subject of ransom in the ancient codes. The *Rhodian* laws speak only of pirates. According to *Valin*, there is nothing to be found as to legal capture and ransom in the law of *France*, except as to the ransom of persons, till 1692. In this country, as before stated, the courts of *Admiralty* have taken cognizance of the recapture of ransom-bills, as well as of ships. Although the *ordonnances* in the *French* Law Marine are silent on this point, yet it is treated of in the *Commentary* of *Valin*, which is not merely the opinion of the writer, but an exposition of the practice of the *French* courts. It is there laid down, that by the recapture the bill is not annulled, but passes to the recaptor. *Tout passe au preneur (q)*.

Secondly, the effect of secreting the bill is to be considered. The civil-law writers consider the captive as incapable of property. In modern times it is otherwise, and by the admission of the captor he has a capacity to acquire property. The taking possession of a ship is a taking possession of every thing which that ship contains. By the *French* law, all papers whatever are to be brought in, and the prisoner is then interrogated whether there are any other papers (*r*). So, by the *English* law, all papers are to be

(q) L'effet du billet de rançon est, par rapport, au preneur de lui donner droit, s'il n'est pas pris lui-même avec ce billet; car alors il perd sa rançon avec

son propre navire, et le tout passe au preneur dont il est la conquête. Vol. ii. p. 286.

(r) 2 *Valin*, 323.

sent to the *Admiralty*, and similar interrogatories are administered (*s*). Being bound, therefore, to deliver up all papers, the retention of any is *mala fide*, and they shall be taken to be delivered up.

The third question arises on the effect of the special stipulation lately introduced into these instruments. It need not be said that the insertion of this stipulation proves that the parties thought the law made the recapture a discharge. But by omitting to provide for the recapture of the *ransom-bill*, they either meant to except that case, or thought that they could not include it. Suppose no ransom-bill given, but that the parties agreed between themselves that the vessel should not be recaptured, could such a stipulation bar the right of recapture? That right is a natural right, which no private agreement can take away. Any such agreement is void in law, as derogatory to the rights of third persons. Can the owner say, "I will not be retaken; I will continue a *French prize*?" The policy of this country has been to ~~discourage~~ *discourage* ransoming, which has never been allowed unless in cases of necessity; but if this clause should stand good, the property in the ransom would be absolutely secured to the captor, to the great benefit of the enemy.

Dr. Wynn, in reply.—With regard to the question of jurisdiction, if the proceedings of the courts of common law are in analogy with those of the *Admiralty* courts, such an objection is too late. In the latter courts the objection must be taken by protestation in the first stage, otherwise it cannot be insisted on. It is said that this is a prize-case, but in fact it bears no greater resemblance to a prize-case than if it were an action on the sale of goods captured, or for a share of prize-money in an agent's hands. There is no proceeding in the *Admiralty* to condemn a ransom-bill. If that had been necessary, there would have been a condemnation of this bill in *France* prior to the action. It is true that some proceedings as to salvage on ransom have been had in

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(*s*) In the "Regulations and Instructions relating to His Majesty's Service at Sea," (1734), the following direction: "The captain is to cause the officers of the prize to be examined, and three or more of the company, who can give best evidence, to be brought to the court of *Admiralty*, together with the charter-parties, bills of lading, and other ship-papers found on board." By another direction, "When a privateer is taken, great care is to be had to secure the ship's papers." P. 90.

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the *Prize* court. Certainly some confusion exists in the practice, but it is probable that those cases were brought there because the ransom-bill remained in the register of that court, and its assistance was necessary; but they are regularly in the *Instance* court. It is said that there was *mala fides* in concealing the papers; but can *English* laws and regulations bind a subject of *France*? The *French* captain had a right to destroy the papers if he pleased. How can he be punished, either for destroying or withholding them? At the utmost he can only be refused a *cartel*, or other matter of favour; but no punishment can be inflicted upon him, as for an offence. The argument from policy is easily answered. The legislature, by its late enactments, has prevented all further mischief.

Cur. adv. vult.

LORD MANSFIELD, after stating the pleadings, and the particular clause in the ransom-bill, and remarking that there was no allegation in the declaration that the ransom-bill was on board, said,—When a ship is taken in war, and a composition is entered into between the captor and the captured to release the ship for a consideration, that is a contract on a reciprocal consideration. On the one hand the ship is released and protected for a time, and on the other hand the captured undertakes to pay the amount of the ransom-bill. If private faith should fail, the captor trusts to national justice. In *Ricord v. Bettenham*, and more lately in *Cornu v. Blackburne*, the Court enforced the payment of a ransom-bill. The defendant relies upon the facts disclosed by his plea; and the consequences implied from those facts are two: 1. That if the bill had been found, it would have been prize, and restored on salvage; 2. That the concealment by fraud amounts to an actual taking. Both these, as between the captor and owner, are merely questions of prize; but this ransom-bill has never been condemned, and we can adjudge nothing to be prize which has not been condemned as such in the court of *Admiralty*. For want of an averment of such condemnation, we are of opinion that the plea is bad, and that there must be

Judgment for the plaintiff.

It being understood that some of the judges did not entirely coincide in opinion with LORD MANSFIELD, the case was mentioned again.

BULLER, *J.*, and WILLES, *J.*, desired to be understood that they did not concur in opinion with Lord MANSFIELD that this Court had jurisdiction. BULLER, *J.*, said, that the cases cited in *Ricord v. Bettenham* went on particular grounds; that the cases of *Le Caux v. Eden* (*t*) and *Lindo v. Rodney* (*u*), depended on the principle that the Court has no jurisdiction in matters of prize, and that the objection might be taken in any stage. In confirmation of this, he mentioned the *French* opinions, from which it appears that the remedy by the *French* law is in the *Admiralty* Court. He said that this Court could not take cognizance, as the gist of the action, of a matter which could not be tried by the rules of the municipal law.

WILLES, *Justice*.—I certainly understood that the judgment would not be inconsistent with the general rule, that a question of prize or no prize is not within the jurisdiction of this Court. My opinion is, that we have no jurisdiction over that question; nor are we concluded by the authority of *Ricord v. Bettenham*, for the point was there given up, and not fully understood. Since the matter has been more maturely considered, the authority of that case has been shaken. The objection of want of jurisdiction may be taken after pleading in chief. I wish the case to be reconsidered.

ASHURST, *Justice*.—I think it better that the case should be further considered. I am not prepared to go into it at present so fully as I could wish. As at present advised, I agree with my brother BULLER. If this Court has no jurisdiction over the subject matter, and it so appears on the declaration, it need not be pleaded, and may be taken advantage of at any period.

Lord MANSFIELD.—My own opinion is, that this is a question of contract, not merely not involving, but in its foundation giving up, the question of prize. Dr. *Wynne* has stated, that no suit ever was entertained in the Court of *Admiralty* on a ransom bill, and that no such bill was ever condemned. Here the plea sets up that which never can appear but through the medium of a Court of *Admiralty*.

ASHURST, *Justice*.—If the collateral matter might have shown that this Court has no jurisdiction, but does not show it, and if this is a question on the contract singly, the Court

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(*t*) *B. R.*, *H.* 21 G. 3, *ante*,
vol. ii. p. 594.

(*u*) *B. R.*, *H.* 22 G. 3, *ante*,
vol. ii. p. 613, *n*.

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then has a jurisdiction, and judgment may stand for the plaintiff.

WILLES, *Justice*.—It appears on the declaration to be a contract made *flagrante bello*.

LORD MANSFIELD.—As we are likely to be divided, the best way is to give judgment for the plaintiff, and to let it go to a superior court.

Judgment for the plaintiff.

On this judgment error was brought in the *Exchequer Chamber*; and upon the argument, *M. 25 G. 3*, the Judges of the *Common Pleas* and the Barons of the *Exchequer* held that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war; and on that ground the judgment of this Court was reversed (*x*).

(*x*) The principle on which *don v. Nesbitt, B. R., M. 35* the reversal of this judgment *G. 3, 6 T. R. 28; Bristol v. Towers, B. R., M. 35 G. 3, 6 T. R. 35*. See also *Furtador v. Rodgers, C. B., T. 42 G. 3, 3 Bos. & Pul. 200*.

Friday,
22d November.

In a notice of action against a Justice of the Peace, an indorsement on the notice of action, "given under my hand at *Durham*," is not a sufficient indorsement of the attorney's place of abode, within the statute 24 *Geo. 2, c. 44, s. 1*.

TAYLOR v. FENWICK (*a*).

THIS was an action of trespass against a Justice of the Peace, to which the defendant pleaded the general issue. A notice of action was produced, when it was objected that the place of abode of the attorney was not indorsed. It only expressed, "given under my hand, at *Durham*, this day;" and it was contended, that this did not show that the place of abode of the attorney was at *Durham*. There were other objections taken, on the ground that the conviction (which was for not obeying an order to pay money, to a militiaman, on certain churchwardens and overseers) was conclusive. The cause was tried at *Durham*, and a verdict found for the plaintiff.

On showing cause, the Court were of opinion that the statute (24 *G. 2, c. 44, s. 1*.) having prescribed the form of

(*a*) *S. C.* cited 7 *T. R.* 635, 3 *Bos. & Pul.* 553, *n.*; *Tidd's Pr.* 27, 8th ed.

the notice, it must be strictly complied with, and that this was not an indorsement of the name and place of abode of the attorney for the plaintiff, according to the directions of the act. The Court therefore directed a nonsuit to be entered (according to the consent of the parties at the trial), although the time for bringing another action had expired.

Nonsuit entered (b).

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(b) The words of the statute are: "On the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode." "Of Birmingham," has been held a sufficient description of the attorney's place of abode. *Osborn v. Gough*, C. B., M. 44 G. 3, 3 B. & P.

551. So "Bolton en le Moors." *Crooke v. Curry*, *Durham Summer Ass.* 1789, 1 *Tidd*, 28, n. 8th ed.; and in the same case it was ruled, that the attorney's name and place of abode being in the body instead of on the back of the notice, was sufficient.—*Ibid*.

BARRY and Another v. NUGENT (a).

ERROR from the *King's Bench* in *Ireland*. This was an action of ejectment for lands in *Ireland*. At the trial the lessor of the plaintiffs proved that the lands in question had been, in the year 1751, and before, the reputed estate of the defendant in ejectment, *Barry*; that, in 1790, a lease of them had been made by *James, Earl of Barrymore*, the defendant *Barry*'s father, and under whom he claimed, for twenty-one years to *Matthew O'Hea*; and that *J. C.*, the agent and receiver of the defendant *Barry*, received for his use the yearly rent, reserved and made payable by the said lease, from 1747 to 1751, when the lease expired; that on the expiration of the said lease for twenty-one years, the actual possession of the said lands was demanded by the said *J. C.*, as agent for the defendant *Barry*, from the said *Matthew O'Hea*, or his personal representative, who refused to deliver up possession, claiming a title to the fee simple and inheritance thereof; that the actual posses-

lands from the heirs, &c.; the said *R. F.* covenanting and agreeing, on the foregoing conditions, to pay to the said *J. B.*, &c. the sum of, &c. Leases, with power of distress, and clauses of re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said *J. B.* recovers the lands," &c. Held, that this instrument operated as a present demise.

Friday,
22d November.
J. B., being wrongfully dispossessed of certain premises, executed the following deed: "Be it remembered that *J. B.* hath let, and by these presents doth demise to *R. F.* (the premises), as now held by *W. F.*, for the full space or term of twenty-one years, to commence the first day of *May* or the first day of *November*, whichever first happens after the said *J. B.* recovers the said

(a) *S. C.* cited 5 *T. R.* 165.

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sion of the said lands had been withheld from the defendant *Barry* by the said *O'Hea*, or his representative, from the expiration of the said lease to 1779, at which time the said *M. O'Hea*, or his representatives, in consideration of £500, released all his right to the defendant *Barry*, who then obtained the actual possession of the said lands; and that he, by the other defendant *Deasy*, his terre-tenant, is now in possession thereof; and thereupon the plaintiffs' counsel produced and offered in evidence a lease, or instrument in writing, bearing date the tenth of *August*, 1751, from the defendant *Barry* to *R. Fuller*, his executors, &c., whose personal representatives the lessors of the plaintiffs now are, purporting to be a demise for twenty-one years of the lands in question: whereupon the defendant's counsel insisted that sufficient evidence had not been laid before the Court to entitle the plaintiff to read the said instrument; which objection the Judge overruled, and the defendant's counsel excepted thereto. The instrument of the tenth of *August*, 1751, was then given in evidence, and was as follows, viz. "Be it remembered, that the Right Hon. *J. S. Barry*, for himself, his heirs, &c. hath set, and by these presents doth demise unto the said *R. Fuller*, his executors, &c. the premises in question, as now held by *W. F.*, for the full space and term of twenty-one years, to commence the first day of *May* or the first day of *November*, whichever first happens after the said *Barry*, his heirs, &c. recover the said lands from the heirs, &c. of *M. O'Hea* deceased; the said *R. Fuller* covenanting and agreeing, on the foregoing conditions, for himself, his heirs, &c. to pay to the said *J. S. Barry*, his heirs, &c. the sum of £110 yearly during the said term, in two equal payments, on the first of *May* and first of *November*; leases, with power of distress and clauses for re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said *Barry* recovers the lands from the said *O'Hea*'s representatives. In witness whereof the parties have put their hands and seals this tenth day of *August*, 1751. *J. S. Barry*. [L. S.]" Whereupon the defendant's counsel insisted that the said deed did not contain a legal demise, and that there had been no evidence of possession under it; but the Judge declared and delivered his opinion to the jury, that the several matters so insisted on, on the part of the defendants, were not, on the whole case, sufficient

to bar the plaintiff of his said action, and with that direction left the same to the jury, who gave a verdict for the plaintiff; whereupon the defendant's counsel objected to the Judge's said opinion, and the Judge sealed a bill of exceptions; which bill of exceptions, the Judge having acknowledged his seal thereto before Lord ANNALY, by virtue of a commission sent from hence to him to receive such acknowledgment, together with the record, was brought by writ of error into the Court of *King's Bench* here.

Bower, for the plaintiff, in error.—The instrument offered in evidence did not import a present demise, but was only preparatory to a lease to be made at a future time. Though present words are used, yet if the intent appears to be otherwise, they will not pass a present interest. The situation of *Barry* at the time of the instrument being executed shows that he could not intend a present demise. At that time he was out of possession, and the tenant “covenanting and agreeing on the foregoing *conditions*,” instead of stating it as a *consideration*, proves the contemplation of a future demise. That demise was only to take place in case *Barry* recovered the lands, an event which never happened; for, twenty-eight years after the execution of this instrument, he acquired the premises by purchase. This is not one of the cases where a present interest is meant to be given, and the lease to be executed afterwards is only for further assurance, as in *Maldon's case* (b). The covenants to be entered into here are by the lessee, and are not for his further assurance, but are intended for the benefit of the lessor, and are to form the consideration for the future demise. In *Harrington v. Wise* (c) and *Abrahall v. Brown* (d) there were circumstances decisive of the intent that the instrument should operate as a present demise; thus, in the former case, the tenant was to enter immediately, and the formal lease was to be made after the entry. The latter case also proceeded on the ground of the receipt of rent by the lessor. He also cited *Sturgeon v. Painter* (e) and 1 *Roll. Ab.* 848, pl. 3.

Chambre, contra.—Both by the words and by the intent, as collected from the words, and according to the authori-

(b) *B. R.*, T. 26 *Eliz.*, *Cro. Eliz.* 33. (d) *C. P.*, H. 15 G. 3, 2 *Blacks.* 974.

(c) *B. R.*, M. 37 & 38 *Eliz.*, *Noy*, 56; *Cro. Eliz.* 486. (e) *Noy*, 128.

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ties, this was a present demise. Not only are the words present, but past: "hath demised and doth demise." The case of *Sturgeon v. Painter* was only a *Nisi prius* decision; and the memorandum added to the instrument, that the articles were to be altered by counsel, showed it to be merely executory, as was also the case cited from *Rolle*. The cases for the defendants in error have been already mentioned in the argument on the other side. *Maldon's case* was not so strong as this, for there were in that case no words of present demise. In *Harrington v. Wise*, the word *provided* is used, which is the same as *on condition* in the present instrument. The instrument in *Abrahall v. Brown* is as nearly similar as possible to the present, and is a recent confirmation of the doctrine.

Lord MANSFIELD.—Mr. *Chambre*, you seem to have overdone it. The cases you have cited are as strong, or stronger than this; and the Court always leans, in the case of a lease, to execute it. Do you remember the case of Sir *W. Yea* (f)?

Judgment affirmed (g).

(f) *Weakly*, dem. *Yea*, v. *R.*, M. 51 G. 3, 13 *East*, 18; *Bucknell*, B. R., M. 7 G. 3, *Hegan v. Johnson*, C. B., M. 50 G. 3, 2 *Taunt.* 148; *Morgan v. Bissel*, C. B., T. 50 G. 3, 3 *Taunt.* 65; *Dunk v. Hunter*, B. R., H. 2 G. 4, 5 B. & A. 322; *Colley v. Streeton*, B. R., M. 4 G. 4, 3 D. & R. 522; *Hamerton v. Stead*, B. R., M. 5 G. 4, 3 B. & C. 481; 5 D. & R. 210, S. C.; *Wright v. Trevizant*, coram BEST, C.J., 1828, 1 M. & M. 231; 3 Car. & Payne, 441, S. C.; *Chambers's Landlord and Tenant*, 168; *Tempest v. Rawling*, B. 273.

(g) See the observations on this case in *Doe v. Ashburner*, B. R., H. 33 G. 3, 5 T. R. 167; and *Doe v. Groves*, B. R., H. 52 G. 3, 15 *East*, 247. See also the cases of *Goodtitle v. Way*, B. R., E. 27 G. 3, 1 T. R. 735; *Doe v. Clare*, B. R., M. 29 G. 3, 2 T. R. 739; *Doe v. Smith*, B. R., T. 45 G. 3, 6 *East*, 530; *Poole v. Bentley*, B. R., H. 50 G. 3, 12 *East*, 168; *Tempest v. Rawling*, B. 273.

1782.

BLAMEY v. WHITAKER (a).

Saturday,
23d November.

THIS was an action against a parson for not taking away the tithe of turnips after they were set out. The cause was tried at *Truro* before PERRY, B., when it appeared that the turnips were pulled as the farmer wanted them, to feed his bullocks; and as they were pulled, every tenth turnip was thrown on the opposite side for the parson, he having given notice that he would require them to be set out in kind as they were gathered from the ground. A verdict having been found for the plaintiff, a rule for a new trial was obtained in *Easter Term* last, when Lord MANSFIELD recommended a compromise, and the rule was enlarged. The compromise having gone off, the case was argued in this term by

Where turnips are drawn in small quantities at a time, the tithe may be set out by placing aside every tenth turnip; and it is not necessary to place the tithe in heaps, unless the farmer gathers the turnips into heaps for himself.

Kirby, Sergeant, and *Lawrence* for the plaintiff. The mode adopted of setting out the tithe was the right and only mode. It was left to the jury to say whether it was or was not a reasonable mode of setting them out, and the jury have determined that it was reasonable. It is also agreeable to the notice given by the defendant, and no fraud appears. It is contended on the other side, that the turnips ought to have been set out in heaps; but if that had been done they would have heated. The case of *Beaumont v. Shilcot* (b) was relied upon by the other side; but that decision is, in fact, in favour of the plaintiff, for, according to that case, turnips ought to be set out in heaps where they are gathered in large quantities, but where they are gathered in small quantities the tenth turnip ought to be set out. There is no other principle in setting out tithe than that a tenth part shall be given. Produce not susceptible of exact division, as grass and corn, is divided in a gross manner by heaps, but this is only a medium of dividing equally, and is not necessary where a more exact mode is practicable. Another objection is made, that cattle were turned in before all the turnips were tithed, and that therefore the action is

(a) S. C. cited 10 *East*, 12, given.
nomine *Blaney v. Whitaker*;
but the judgments of *ASHURST*,
J., and *BULLER*, J., are alone

(b) *Scacc.*, H. 8 G. 3, 2 *Eagle*
& Y. 226; 2 *Gwill.* 944; 3
Wood's Decr. 171, S. C.

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not maintainable, and *Shapcott v. Mugford* (c) was cited; but that decision can only apply where the species of tithe is such that the whole may be tithed at once. The mode of cultivation in this case will not admit the keeping out the cattle so long as in corn ground. In fact the field was months in tithing. If the tithe was well set out, the tenant was not bound to do any thing more for the convenience of the parson. 1 *Roll. Ab.* 644, pl. 6.

Batt, contra.—There are two grounds upon which this rule ought to be made absolute: 1. The mode of tithing was unreasonable; and the question of reasonableness, which is a question of law for the Court, was improperly left to the jury. 2. By turning in his cattle, and taking justice into his own hands, the plaintiff destroyed his right of action. The case of *Beaumont v. Shilcot* is in point for the defendant. The result of that case is, that where turnips are gathered in such quantities as to admit of being put into heaps, they shall be so for the benefit of the parson. *Walton v. Tiers* (d) shows, that in some cases the farmer shall be at the expense of labour for the benefit of the parson. There is great expense in picking and sorting hops, yet in that case it was held by the *House of Lords*, that, to prevent fraud, the tithe should be taken after that operation. So in the case of corn, it must be put into sheaves before it is tithed. No case is to be found on the mode of tithing potatoes, but it is understood that the practice is to tithe them by measure. If this is not a question of law, every jury may establish a different mode. [Lord MANSFIELD.—To be sure, what is a reasonable mode of tithing is a question of law, and not a question of fact, to be left to the jury; but if the jury have determined it according to law, the Court will not grant a new trial.] Here the turnips were drawn by ridges about fifty feet in a day. It was said by one witness, that the expense of collecting the tithe would have been about one penny a-day, and that the value of the tithe was sixpence a-day. Upon the second point, *Shapcott v. Mugford* is expressly in point. The plaintiff had no right to turn his cattle upon the land until all the turnips were severed from the ground.

Lord MANSFIELD.—This action is vexatious; but the

(c) *B. R., E. 9 W. 3., 1 Ld. Raym.* 187. (d) *Dom. Proc.* 1753, 5 *Bro. P. C.* 99; 3 *Burn's E. L.* 492.

question is, Whether the plaintiff can recover at law? It is objected, that he is barred by having taken his own remedy; but there is no ground for that objection. Upon the other question I am under great difficulty, and if *Beaumont v. Shilcot* does not decide it, we must consider the general reasoning. The usual rule certainly is, that the farmer is not bound to be at any expense for the benefit of the parson. If he sets out his own in heaps, he ought also to set out the parson's in heaps; but here, if he had set out the parson's share in heaps, it would have been labour expended merely for the parson. If there is any difference of opinion I should be glad to consider it further.

WILLES, Justice.—The case in the *Exchequer* seems to determine, that if the quantity is sufficient to be put into heaps, the farmer shall put it into heaps. Here the parson's tithe each day is said to have been worth sixpence, and that quantity, I should think, would make a heap. To oblige the parson to gather them together is taking away one-sixth of his tithe. I think, that where there is enough to make a tenth heap, it ought to be set out. The farmer might have left the tenth wheelbarrow full, and have thrown them together.

ASHURST, Justice.—The safe rule is, that whatever degree of industry the farmer must use, before he carries away the produce, he must use for the benefit of the parson as well as for his own; but he is not bound to bestow any additional labour. Thus, in hay (e) and corn, the farmer must put it into cocks and sheaves for his own benefit, and therefore he shall do the same for the parson. In gathering a whole field of turnips they must be thrown into heaps; but here the whole field was not gathered at once, and therefore I think the farmer was not bound to do that for the parson which he did not do for himself. This agrees with the decisions, and the case in *Rolle* is strong that way.

BULLER, Justice.—As to the last objection made on the part of the defendant, that the plaintiff has in part taken his remedy into his own hands by turning in his cattle, it is *stricti juris*, and it is sufficient if the plaintiff has suffered damage for any part of the time laid in the declaration. As to the other objection, I agree entirely with my brother

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(e) Hay is titheable in the teded. *Newman v. Morgan*,
grass-cocks after having been *B. R., T. 48 G. 3, 10 East, 5.*

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ASHURST. I think, that if the farmer puts the turnips into heaps for himself, he must also do so for the parson; but that if he does not do so for himself, he need not do so for the parson. Indeed, I think it is the fairest way for the parson to set the tithe out by single turnips; whether they be small or great is a matter of chance; and as to fraud, that is an objection not to the mode, but to the conduct of the party. Where the turnips are set out by the farmer in heaps, then, of course, the most convenient mode is to take the tithe in heaps. The rule of law is, that the first opportunity is to be taken of dividing, as soon as the matter is in a proper state to be tithed. Corn and hay cannot be fairly divided till in heaps, for the size of the swathe depends on the strength of the mower and on other circumstances. I think, that taking the tenth wheelbarrow would not be a fair way.

LORD MANSFIELD.—Let the rule be discharged. If we change our minds we will let you know.

Rule discharged (*f*).

(*f*) The turnips must be set out in the place where gathered. Where potatoes were carried off the field into a brewhouse, and there measured and set out for the parson, it was held not to be a due setting-out of the tithe. *Bosworth v. Limbrick, Scac.*, *M.* 18 G. 3, 2 *Eagle & Y.* 310; 3 *Gwill.* 1110, *S. C.*

The principal case appears to coincide with that of *Beaumont v. Shilcot*, although the mode in which the turnips were gathered (whether in small or

large portions) is not particularly stated. *ADAMS, B.*, says, "The parson is to have the fair and full tenth. There is no particular rule yet laid down for setting out the tithe of turnips. The setting out single turnips is liable to great fraud. If a whole field or whole acre be gathered at one time, they may well be set out in heaps; but if only a few are gathered at a time, that method cannot be observed. In that case single turnips must be set out."

Tuesday,
26th Nov.

BAENES, Assignee of SAUNDERS, *v.* MATON (*a*).

Where an action is pending at the suit of a bankrupt, and the assignees arrest the defendant for the same cause of action, it is not vexatious. Assignees cannot make themselves party to a suit commenced by the bankrupt before interlocutory judgment.

THIS was a motion to discharge the defendant on common bail; he having been held to bail by the assignees of a bankrupt, and having previously given bail in an action by the

(*a*) *S. C.* cited by Lord ELLENBOROUGH, 15 *East*, 631.

bankrupt himself. *Bearcroft* moved it on a former day, but the Court thinking the bankruptcy an abatement, and that the assignees were compelled to commence the suit again, refused the motion. *Bearcroft* renewed his application, and cited *Bibbins v. Mantell* (b), and *Mayo*, assignee of *Heron*, v. *Gregory* (c). [BULLER, J., inquired, whether there was any interlocutory judgment in these cases. *Bearcroft*.—In *Bibbins v. Mantell* there was, but not in *Mayo v. Gregory*. Lord MANSFIELD.—After an interlocutory judgment the assignees may make themselves parties to the suit by *sci. fa.*; but how can they do so here? *Bearcroft*.—They may perhaps do it by suggestion on the record.] A rule to show cause having been granted,

Mansfield showed cause. [BULLER, J., read a note of *Bibbins v. Mantel* fuller than the report in *Wilson*, in which WILMOT, C. J., said, that if the bankruptcy happened before the interlocutory judgment, the assignees could not proceed.]

Bearcroft, contra.—It is enough, in order to sustain this application, to show that the assignees might have proceeded, if they had so chosen, in the name of the bankrupt; and it is immaterial that they had also the power of proceeding in their own names. If the first action might have been carried on, the second is vexatious. The only difficulty is, that the defendant might plead the bankruptcy of the plaintiff; but if it should be made to appear that the assignees are carrying on the action for their own benefit, the Court would not suffer such a plea to be put in.

Lord MANSFIELD.—The second arrest is not vexatious, unless the assignees could have proceeded in the action commenced by the bankrupt. Now, the defendant might have pleaded the bankruptcy of the plaintiff, and the Court could not have set aside a plea which was a legal bar.

Rule discharged (d).

(b) *C. B.*, M. 8 G. 3, 2 *Wils.* 358, 372.

(c) *B. R.*, T. 1777.

(d) See *Kinnear v. Tarrant*, *B. R.*, E. 52 G. 3, 15 *East*, 622; *Biggs v. Cox*, *B. R.*, M. 6 G. 4, 7 *Dowl. & Ry.* 409; 4 *B. & C.* 920, S. C.; *Minchin v. Hart*, *B. R.*, H. 49 G. 3, 1 *Chitty*, 215. But it seems that where the defendant has been arrested in an

action brought in the name of the bankrupt, but by the authority of the assignees, he cannot be afterwards arrested at the suit of the assignees for the same cause of action, unless the first action has been discontinued, or the costs paid. *Carter v. Hart*, *B. R.*, E. 59 G. 3, 1 *Chitty*, 276; *Tidd*, 175, 8th ed.

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BARNES,
Assignee of
SAUNDERS,
v.
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Tuesday,
26th Nov.

Where a debtor is discharged under an insolvent act, and afterwards gives a promissory note for a debt due before, there is a good consideration for such note, and he may be sued upon it.

BEST v. BARBER (a).

MOTION to set aside an execution against the goods of the defendant, who had been discharged under the insolvent act of 1781, by which act the future effects of the bankrupt are protected, except money in the funds. The execution was in an action on a note given by the insolvent after his discharge, for a debt due before. A rule to show cause having been granted,

Haworth showed cause, and *Mingay* having been heard for the rule, the Court took time to consider.

Lord MANSFIELD.—We have considered this question, which arises on a note given by a discharged insolvent for a debt due before. There are several cases in which the principle has been established, that where the statute takes away the remedy, but the debt still remains, that debt is a good consideration for a subsequent promise. It is so in the case of a debt on which the statute of limitations has run. So, also, with respect to promises made after bankruptcy, or after a discharge under an insolvent act for debts due before. There is a case of this sort before Lord HARDWICKE.

Rule discharged (b).

(a) *S. C. nomine Best v. Horton v. Moggridge, C. B., E. Barker*, 8 *Price*, 533. 56 *G. 3*, 6 *Taunt.* 563; *Black-*

(b) As to holding the defendant to bail on such a promise, see *Wilson v. Kemp, B. derer, B. R., M. 3 G. 4*, 1 *B. & R.*, *H. 50 G. 3*, 3 *M. & S.* 595; *C. 116*; 2 *Dowl. & R.* 240, *S. C.*

WETHERELL v. HALL.

(Reported, *Caldecott*, 230.)

1782.

CLARKSON v. WOODHOUSE and Another (a).

Wednesday,
27th Nov.

THIS was an action of trespass for breaking and entering three closes of the plaintiff, lying in *Stalmine*, in the county of *Lancaster*. The pleas were, 1. Not guilty; 2. A justification in right of an ancient messuage in *Stalmine*, to take turbary for fuel in, upon, and through *Stalmine Moss*, lying in *Stalmine* aforesaid; and, 3. A justification in right of an ancient messuage and lands in *Stalmine* for common of pasture, in, upon, and throughout *Stalmine Moss*, lying in *Stalmine* aforesaid, for commonable cattle, *levant and couchant*. Replication, that the closes in which, &c. are parcel of *Stalmine Moss*; that *Stalmine Moss* is within the manor of *Stalmine*; and that there are divers ancient messuages as well as defendants', which, from time whereof, &c. have had common of turbary in and upon the said waste or common (except such parts thereof as have been approved and enclosed, in manner hereafter mentioned, after such approvement and enclosure of such parts respectively), to dig and take turves in and upon the said waste or common (except as aforesaid) for their necessary fuel, to be burnt and consumed in their respective messuages, every year, at all times of the year, as occasion hath required; and also common of pasture in, upon, and throughout the said waste or common called *Stalmine Moss*, whereof, &c. (except the said respective parts thereof which have been approved and enclosed, in manner hereinafter mentioned, after such approvement and enclosure thereof), for all their commonable cattle, *levant and couchant*, in and upon the said respective messuages and lands. And the replication further stated, that within the manor of *Stalmine* aforesaid, there has been a custom, that the owners of the waste or common called *Stal-*

Trespass for breaking and entering three closes in *Stalmine*. Pleas in justification: 1. A right of common of turbary; 2. Of pasture. Replication, that the closes are parcel of *Stalmine Moss*, within the manor of *Stalmine*; that there are divers ancient messuages which have had common of turbary and pasture upon the waste. The replication then stated a custom within the manor of *Stalmine*, for the owners of *Stalmine Moss*, by themselves, or their moss-reeves, to assign to the owners of such ancient messuages certain reasonable proportions of the moss-dales, to be by them held in severalty, for the purpose of getting turves; and after the moss-dales shall have been cleared, the owners of the moss shall hold the same in severalty, discharged from all common of turbary and pasture. The replication then stated the clearing and approvement of the closes accordingly. Rejoinder, traversing the custom, and verdict for the plaintiff. On motion in arrest of judgment it was objected, 1. That the custom was bad, as extending to messuages without the manor; 2. That it was bad, as repugnant to the right claimed in the plea; 3. That it was bad, as not being stated to extend to all the ancient messuages; 4. That it was bad, in stating that "reasonable proportions" were to be assigned. Held, that the custom, as stated in the replication, was good.—Counterparts of old leases from the repository of a lord of a manor are evidence of the demise of the premises, without proof of enjoyment.

(a) S. C. 5 T. R. 412 (a).

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mine Moss, for the time being, by themselves or their superintendent of the said waste or common for the time being, called the moss-reeve, from time whereof, &c. have, from time to time, as occasion has required, set out and assigned, and have been used, &c. and of right ought, &c. to set out ~~and assign~~ to the several and respective owners and occupiers ~~of such ancient messuages and lands, upon their reasonable~~ request in that behalf, certain reasonable parts and proportions of the said waste or common, commonly called moss-~~dales~~, to be by them respectively held in severalty, ~~exclusively of all others, for digging and getting~~ turves therein for their necessary fuel, to be burnt and consumed in ~~such~~ their respective messuages every year, at all times of the year, as to such their respective messuages belonging and appertaining; and that the respective owners and occupiers of such ancient messuages for the time being, for all the time whereof, &c. have dug and got, and have been used and accustomed to dig and get, and of right ought to have dug and got, and still of right ought to dig and get, such turves for their necessary fuel, to be burnt and consumed in such their respective messuages as aforesaid, in such their several and respective moss-~~dales~~ so to them assigned and set out as aforesaid, and in no other part or parts of the said waste or common, so long as any turbary has remained, or shall remain, in such respective moss-~~dales~~ so assigned and set out; and when and so often as the turbary of such moss-~~dales~~, so assigned and set out as aforesaid, has been, or shall be, got and cleared therefrom, by such digging and getting of turves for the purposes aforesaid, the owners of the said waste or common called *Stalmine Moss*, for the time being, for all the time whereof, &c. have enclosed and approved to themselves, and of right ought to enclose and approve to themselves, all such moss-~~dales~~, or other parts of the said common or waste called *Stalmine Moss*, as have been, or shall be, cleared as aforesaid, commonly called the following ground thereof, and to hold the same so enclosed at their pleasure, in severalty, for ever afterwards, freed and discharged from all common of turbary and pasture thereon. The replication further stated, that *A.* and others were seised of moss, and being so seised, enclosed and approved the closes, being moss-~~dales~~, cleared in manner aforesaid, and demised to the plaintiff. The rejoinder traversed the custom stated in the replication, on which issue was joined. The

cause was tried at *Lancaster*, before EYRE, B., when, on the part of the plaintiff, counterparts of several old leases were produced in evidence from the lord's repositories, by which former lords had granted portions of the moss or waste. The oldest of the leases produced was dated in 1680, and the latest of those admitted in evidence was dated 1702 or 3. A lease dated in 1780 was rejected. No evidence of enjoyment under these leases was given. The jury having found a verdict for the plaintiff, a new trial was moved for, on the ground that the evidence of the old leases had been improperly admitted.

LORD MANSFIELD said, and the whole Court agreed with him, that these old leases were proper evidence to show, that, at that time, the lord of the manor did in fact demise the ground; and that this was very different from the case of *Smith v. Lord Pomfret* (b), where, the question being on boundaries, a conveyance by Lord Pomfret, or his predecessor, was offered to prove, from the description contained in it, that the place in dispute was within his manor. His lordship added, that it was impossible to give evidence of enjoyment under such old leases (c). The rule for a new trial was consequently refused.

The defendants then moved an arrest of judgment on four grounds; 1. That the custom set out in the replication is laid to be within a manor, and yet is made to extend to something without the manor, the messuages to which it is applied not being stated to be within the manor; 2. That the custom stated in the replication is repugnant to the right claimed in the plea; 3. That the custom is not stated to extend to all the ancient messuages, even if within the manor, but only to divers ancient messuages; 4. That *reasonableness* is not sufficiently certain.

Wallace, Davenport, and *Topping*, having been heard in support of the rule,

Lee, Wilson, Chambre, and *Wood*, showed cause.—The first objection is, that the custom is laid in the manor, and claimed to be enjoyed by persons residing out of the manor. There is no case to be found which establishes this objection. Lord COKE says, that a custom must arise from act of par-

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(b) 7 Bro. P. C. 440.

N. P. C. 309; 1 Phill. Ev. 240,

(c) See *Rogers v. Allen*, cor. 6th ed.

HEATH, J., 1808; 1 Campb.

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liament, and not by grant. [Lord MANSFIELD.—He must mean, that where a custom is proved which is unreasonable, and could not arise from a grant, the Court will presume an act of parliament to support it.] 2. The custom stated in the replication is not inconsistent with that in the plea. The plaintiff does not negative the general right of common; he only says, that where the moss has been cleared away the general right is not to be exercised. 3. The Court will not, after verdict, presume that there are any ancient messuages to which the custom will not apply. *Bull v. Steward* (d). 4. “Reasonable parts and proportions of the said waste” is sufficiently certain. In *R. v. the Inhabitants of St. Michael* (e), the judgment was, contrary to the report, affirmed. [BULLER, J., said he had a note of that case, and the judgment was in fact affirmed.] They also cited 15 *Ed. 4*, 29. 1 *Roll. Ab.* 565. *Thom. Ent.* 327. 410; *Copyhold Cases*, 4 *Rep.* 32; *Wigglesworth v. Dallison* (f).

Lord MANSFIELD.—Although the objections stated were on the first view specious, yet, on considering the effect of them, there is little room for doubt. The first objection is, that it is not alleged that the ancient messuages lie within the manor of *Stalmine*, but only within *Stalmine*; that is, within the vill of *Stalmine*. The replication does not in fact state that they are all within the manor; and it is upon that urged that the custom must be void, as extending out of the manor. The objection, however, fails, if the distinction between a prescription and a custom is attended to. Where an individual claims an immemorial right to any estate or privilege without attempting to show any other title than that which arises from the presumption derived from such an uninterrupted enjoyment, that is a prescription in him; but if there exists a general rule of property defined within certain limits and local descriptions, this rule, whether of property, or policy, or civil proceeding, becomes the law of the place, governing all property situated within those limits, in whatever place the owner of that property may happen to reside. Thus all property lying in *England*, whether enjoyed by a native or by a foreigner, must be regulated by the law of *England*, and the possessor must take it subject to

(d) *B. R.*, M. 23 G. 2, 1 *Blackst.* 718.  
*Wils.* 255. (f) *B. R.*, T. 19 G. 3, *ante*,  
 (e) *B. R.*, T. 10 G. 3, 2 vol. i. p. 201.

that regulation, and in no other manner. If an estate be within a manor, the custom, which is the law of the manor, directs the estate: so where land is devisable by the custom of particular boroughs, the law of the place regulates the enjoyment. In the present case, all the moss lies within the manor, and is to be governed by the custom of the manor. The second objection was, that the qualification set up in the replication is repugnant to the right stated in the pleas; for that, by the custom alleged by the plaintiff, all the turbary, as well as the pasture, may in the end be destroyed. But a repugnancy to destroy a custom must be such as, by the contradiction of the terms appearing on the statement of the right and custom together, virtually implies that the custom could not subsist, because the right which establishes the one negatives the other, which is incompatible with it. Thus a sheep-walk implies that the lord shall not enclose at his pleasure; for if he does, there can be no sheep-walk. But in this case there is no such inconsistency, for the custom might have been a reservation in the original grant, and the right might have been restricted within those limits by the original agreement. For a reservation in a grant no consideration is necessary, since, when the whole is an act of bounty, it is sufficient that so much and no more was given. The other objections were not much insisted upon in argument. The law will at all times restrain the lord from an arbitrary and excessive use of his power; and the fuel being in this case to be consumed in the houses, furnishes a limit and a test whereby to judge of the reasonableness of the assignment. It is not without benefit to the tenant that the moss-ales should be thus assigned, rather than that he should have a general liberty; because it is a convenience to him to have a portion assigned which will be near his house; and at hand for his occasions.

WILLES and ASHURST, *Justices*, of the same opinion:

BULLER, *Justice*, compared the pleas and replication, to show that it might be intended that the ancient messuages—to which, as well as to the messuage of the defendants, this custom was stated to apply—were all the ancient messuages. He said, that perhaps *reasonable* proportions might in this case imply that sufficient was to be left, but that it was not necessary to determine that point, because in this case sufficient had been left: he added, that *reasonable* may take in

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all the considerations by which the property upon which the assignment is exercised is to be determined.

Judgment for the plaintiff.

On *Saturday*, the 11th of *February*, 1786, this judgment was unanimously affirmed in the Court of *Exchequer* Chamber (*g*).

In the argument in the *King's Bench* a question was made, whether the plaintiff ought not to have traversed, in his replication, the general right claimed by the defendants in their plea, because otherwise the answer is only argumentative; and when a qualification is set up, the general right ought to be traversed. This was argued at the bar, but the Court said nothing of it, it being an objection of form only, to be taken advantage of by demurrer, and not available after verdict (*h*).

(*g*) See *Arlett v. Ellis*, *B. R.*, *T.* 8 G. 4, 7 B. & C. 346, and the observations there on the principal case, p. 367. (*h*) See *Kenchin v. Knight*, *B. R.*, *T.* 22 & 23 G. 3, 1 *Wils.* 253, and *Arlett v. Ellis*, *ubi sup.*

Thursday,  
28th Nov.

ROBERTS, *qui tam*, v. IRVINE.

In an action of debt for a penalty under 2 Geo. 3, c. 20, s. 16, for acting as a major of militia without being duly qualified, it is sufficient to aver that the defendant acted as such major, "not being in any manner qualified by the laws and statutes of the realm."

THIS was an action of debt, brought as well for the clerk of the regiment of militia, &c. for the common stock of the said militia, as for the plaintiff. The declaration stated that, after the 2 Geo. 3<sup>(a)</sup>, and 9 Geo. 3, the said defendant did execute one of the powers conferred by the said acts of parliament on majors of militia, not being in any manner qualified by the laws and statutes of the realm, &c. whereby an action did accrue to the said clerk of the said militia, &c. and to the plaintiff, &c. Plea, not guilty. A verdict having been found for the plaintiff, a rule was obtained by *Bower* to show cause why the judgment should not be arrested.

*Wallace*, A. G., and *Rous*, showed cause.—The objection is, that the declaration does not show on what disqualification the jury found their verdict, for that it only states that the defendant exercised the powers of a major of militia, not

(*a*) 2 G. 3, c. 20, s. 16.

being qualified by the laws and statutes of the realm in any manner so to do. This objection cannot be maintained. The allegation in the declaration, that the defendant was not in any manner qualified, negatives every qualification, and puts the defendant to show any qualification he may have to exempt him from the penalty. It resembles a declaration on the game laws, where the allegation is the same as here. Besides, after verdict, every intendment shall be made to support the declaration in penal as well as in other actions. *Saint John v. Saint John* (b); *Frederick v. Lookup* (c).

*Mansfield* and *Bower*, *contra*.—The declaration does not contain sufficient certainty, for it does not show that the defendant was disqualified by want of estate, which is the only disqualification that can subject him to the penalty here claimed. Nor is this defect aided by the verdict, for the Court, after verdict, will only intend that those facts were proved at the trial, without the proof of which the plaintiff could not recover. But here the proving that the defendant is any way disqualified proves the declaration; yet every disqualification, of which there are many, does not subject him to the penalty. Upon a general declaration like this, the party cannot tell that the want of estate is the charge intended against him, and therefore might not be prepared to meet it. The form of declaring on the game laws will not warrant this, because, in an action on the game laws, every disqualification has the same effect, and subjects the party to the same penalty. Had the declaration set out negatively all the disqualifications, it would have appeared whether this was amongst them.

LORD MANSFIELD.—There was no surprise here, for the action is brought by the clerk of the regiment under a particular statute, and the defendant ought in his defence to have shown himself qualified under that statute.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—The words “not being in any manner qualified” do not alter the case, and would not assist the declaration if it were otherwise imperfect. The charge is, that the defendant has acted not being qualified, and he must come prepared to prove at the trial that he is qualified in every particular. It would not have been better for him

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(b) *Hob.* 78.

(c) *B. R.*, *H.* 7 G. 3, 4 *Burr.* 2018.



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if the plaintiff had set out every disqualification, for he must still have come prepared to prove himself qualified (d).

Rule discharged.

(d) In Mr. Wilson's note of this case there is the following passage:—"But they held that the plaintiff, having claimed a penalty under particular statutes, could not recover without proving the defendant disqualified under those statutes; and on the same account the defendant was apprised that it would be incumbent on him to prove himself qualified under these acts." In two other reports of the same case there is nothing said of the Court having held it incumbent on the plaintiff to prove the disqualification, and

Mr. Wilson was therefore probably mistaken. If it lay upon the plaintiff to prove the disqualification, it could hardly be said to be incumbent on the defendant to prove himself qualified. In actions upon the game laws, the *onus probandi* does not lie upon the plaintiff, but upon the defendant, since it is a fact peculiarly within his own knowledge. See *Spieres v. Parker*, B. R., H. 26 G. 3, 1 T. R. 144; *The King v. Stone*, B. R., T. 41 G. 3, 1 East, 651; *Jelfs v. Ballard*, C. B., T. 39 G. 3, 1 Bos. & Pul. 468.

# C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

HILARY TERM,

IN THE

TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.

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THE KING v. THE INHABITANTS OF WOODSFORD.  
(Reported, Caldecott, 236.)

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Friday,  
24th January.

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RINGSTED, and Another, v. JANE BUTLER, widow, DOW-  
AGER COUNTESS OF LANESBOROUGH IN IRELAND (a).

Wednesday,  
29th January.

**T**HIS was an action of assumpsit, and the defendant pleaded, 1. The general issue; 2. The statute of limitations; and 3. That at the time, &c. she was covert with *Brinsley Butler, Earl of Lanesborough*, in the kingdom of *Ireland*, then her husband in his lifetime, who is since deceased. To the 3d plea, the plaintiffs replied, that the said *Jane* and the said *Brinsley Butler*, long before, &c. viz. on the 1st of *January*, 1774, were parted and separated, and lived apart and separate from each other, and always from thence, and until the time of the death of the said *Brinsley Butler*, continued to live separate and apart from each other; to wit, the said *Brinsley Butler* in the kingdom of *Ireland*, and the said *Jane* in *England*; and the said *Jane* during all that time, by a certain deed of separation

The wife of a person who resides in *Ireland*, herself living in *England*, and having a separate maintenance under articles of separation, may be sued after the death of her husband for a debt contracted by her in *England* during his lifetime.

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and maintenance, for that purpose made and provided, had a large maintenance allowed and duly paid to her, from the said *Brinsley Butler*, for her separate support and maintenance. To this replication the defendant demurred specially, and assigned for cause that the plaintiffs have not set forth the date of, or parties to, or the substance of, the deed of separation and maintenance in the said replication mentioned, nor the amount of such pretended maintenance, nor where payable, nor have brought into court the said deed, or any counterpart thereof; and that the said replication offers to put in issue matter foreign to the matter of bar pleaded by the defendant. The case was argued in *Michaelmas Term* by *Morgan* for the defendant, and by *Lawrence* for the plaintiffs.

*Morgan*, for the defendant.—A *feme covert* cannot contract during coverture, unless in the case of the abjuration of the realm, or the exile of her husband, *Co. Litt.* 132 *b*, 133 *a*, or by the custom of the city of *London*, by which a *feme covert* trading there may make herself liable; but this exception confirms the general rule. In no other case can a *feme covert* make herself liable. *Lane v. Schutz* (*b*), *Hatchett v. Baddeley* (*c*). [Lord MANSFIELD said, that in a case at *Maidstone*, where the husband had been transported, he had held the woman liable, and that Mr. Justice YATES had done the same at *Carlisle* (*d*).]

*Lawrence, contra*.—If the defendant is not liable, no one else can be charged, for she was living separate from her husband, who was in *Ireland*, and certainly no credit was given to him. The cases cited on the other side may be distinguished. *Hatchett v. Baddeley* went on the ground of elopement not being a word known to the Court. Dr GREY, *Chief Justice*, distinguished it from the case of a woman separated from her husband and having a separate maintenance: in that case also it was objected, that the husband had not been joined for conformity; but here the defendant is a widow. So also in *Lane v. Schutz* it does not appear that the Court agreed on the general question. A *feme covert* cannot contract, on account of the union between her and her husband. She has no property, she has

(*b*) *C. B.*, *E.* 18 *Geo.* 3,  
 2 *Black.* 1195.

(*c*) *C. B.*, *E.* 16 *Geo.* 3,  
 2 *Black.* 1079.

(*d*) *Sparrow v. Carruthers*,  
 cited 1 *W. Bl.* 1197, 1 *T. R.* 6;  
 and see 2 *B. & P.* 233, 1 *B. &*  
*P.* 359.

no will of her own. The exceptions to the general rule are cases in which the union has been dissolved; nor is it material by what means that dissolution has taken effect. It need not be founded on the crime of the husband. Profession is no crime; and the *Duchess of Mazarine's* case (e) did not proceed on the ground of crime. Here the dominion of the husband has ceased, for the Court will not permit a husband to reclaim his wife, living apart from him under articles of separation. *R. v. Mead* (f). It is not necessary to argue that the wife can contract so as to bind her husband, or her husband's property; it is sufficient to show that she has the capacity of binding her own separate property. It is by no means universally true that a *feme covert* cannot contract. In *Chancery* she may contract, so as to bind her separate property. *Dubois v. Hole* (g). So may a *feme covert* trader in *London*. There are also some cases in which, where the wife has been the meritorious cause, she may be sued after her husband's death, though not in his lifetime.

*Morgan*, in reply.—In settlements on separation there is always a security to protect the husband from the wife's debts. The Court will not permit a husband to reclaim his wife after separation, because it is against his own agreement. The case of the *Duchess of Mazarine* is in favour of the defendant, for the jury is there said to have determined against law (h).

LORD MANSFIELD.—The cases in the *Common Pleas* show that the Judges of that court regarded the general question as one of great importance, and in both of those cases the judgment of the Court proceeded on partial grounds. It is certainly a considerable question; for within the last century a great change has been introduced into the law relating to married persons, by means of trusts; and there is also a system of cases for the protection of the husband against the debts of the wife. It is settled, that a woman eloping, or living in adultery, shall not charge her

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- (e) *B. R.*, *H. 8 W.* 3, 1 *Salk.* 116; 2 *Salk.* 646; 1 *Ld. Raym.* 147, *S. C.* marginal abstract in 2 *Salk.* 646, where it is said that a new trial was not granted for mistake, in point of law, against the honesty and equity of the cause. See also 2 *Wils.* 308.
- (f) *B. R.*, *E.* 31 *G.* 2, 1 *Burr.* 542.
- (g) 2 *Vern.* 614.
- (h) This is taken from the

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husband if the creditor was acquainted with her situation ; but in the mere case of a woman living separate, the creditor stands in her place as to necessaries, and if she is entitled he is. There is also a third class of cases—where the woman lives separate, and has a maintenance, and the creditor knows of it ; in which case he shall not charge the husband. Here it was notorious that *Lady Lanesborough* was separated : she resided in *England*, while her husband remained in *Ireland*. To hold a woman liable under such circumstances is justice to the creditor and mercy to the woman herself, for it enables her to obtain credit. But it is a question of consequence, and I should be glad to have it argued again.

The case, therefore, stood over for further argument until the present term, when it was argued by *Wallace* for the defendant, and *Davenport* for the plaintiffs.

*Wallace*, for the defendant.—The general question is, whether a woman in the situation of the defendant is liable to engagements of all sorts as a *feme sole*. Coverture is at least a general answer to the demand. *Manby v. Scott* (i). The Judges there differed on other points ; but upon this they all agreed, that a *feme covert* cannot bind herself. The question will be if the present case be an exception, for that there are exceptions must be admitted. Thus the civil death of the husband, as by profession, exile (by act of parliament), or abjuring the realm, will render the wife capable of contracting. *Co. Litt.* 132, 133. But it is said in the same place, that where the husband is only banished for a time, she is not capable. In the former cases, indeed, she had her dower. From that time until the late decisions in the *Common Pleas*, there has been no case on the subject. The case of *Hatchett v. Baddeley* went entirely on the elopement, and no point was made on separate maintenance. That question came on in *Lean v. Schutz*. The replication in the present case is copied from that in *Lean v. Schutz*, except that it does not lay the debt to be for necessaries, or things suitable to the wife's condition. That case does not prove any thing as to the general point, except that one judge differed. Under the custom of *London*, the surplus of a *feme trader's* estate is the husband's. That is the reason of the husband being joined, in order that he may see that the estate is taken care of. A sole trader is liable

(i) *Exc. Ch. E. 15 Car. 2, 1 Sid. 109 ; 1 Lev. 5, S. C.*

only to debts in trade. Here, at the utmost, the separate maintenance only is to be applied to the finding of maintenance. Yet, under the pleadings, it must be argued that the wife is liable to engagements to any extent, while, at the same time, she is incapable of acquiring property; for if there is a gift or bequest to her during separation, the husband will take. That the union between the husband and wife continues, appears from the fact, that if he purchases lands during the separation, she is entitled to dower. In equity the separate estate is only made answerable by the intervention of trustees; and the decree is always against the trustees, and not against the wife. In one case, where after the death of the husband the wife became entitled to her jointure, an application was made to subject the jointure to her debts, which the *Lord Chancellor* refused to do because the separate maintenance was gone.

*Davenport, contra.*—There are a great many distinct relations between the husband, and wife, and creditors, under different circumstances, though it is true that none of the cases go directly to the present question. With regard to the right of the creditor against the husband, there are two cases in which the latter is not liable. 1. In case of adultery. While the wife lives in adultery she cannot have any relief, either in equity or in the spiritual court, and the husband is not liable to her debts. 2. Where the wife has a separate maintenance, of which the creditor has notice, the husband is not liable. It remains to consider what right the creditor has in those cases against the wife herself. The reasons why the wife is not liable are, that she has no will of her own, that she has no property of her own, and because otherwise a separation might be effected by collusion. The cases have gone so far, that where a judgment has been obtained against a *feme sole*, the husband may come in and reverse it on error. *Hayward v. Williams* (k). With regard to the criminal liability of a *feme covert*, she is answerable for crimes committed without the intervention of her husband, being then considered a sole agent; and in treason, and some other crimes, she is answerable, though they be committed by her jointly with her husband. *Hale, P. C.* 44, 45, 46. So there are some acts of a civil nature done by a wife, which, if not

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(k) *Upp. Bench, T.* 1651, *Styles*, 280.

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avoided by her husband, will bind her. Thus she may levy a fine alone; which will bind her, though not her husband. *Br. Ab. Fine of Lands*, pl. 33. The cases of abjuration, profession, and exile, put by Lord COKE, proceed upon no other ground than that of necessity and convenience. There are other authorities to the same effect. In *Br. Ab. Baron & Feme*, pl. 66, it is said that the wife of a man exiled may sue in trespass alone. The case of *Lady Maltravers* <sup>(l)</sup> is to the same effect. The decision at *Maidstone*, where the wife of a man transported, being a baker, was allowed to be sued alone, proceeded on the same ground of necessity. The woman had a right to labour, and to make her earnings available for her creditors. If she had had a separate maintenance, the reasoning and the decision must have been the same. The argument urged on the other side, as to the right of dower out of the purchased lands, and the right of the husband to a bequest made to the wife, would apply in the case of a man who has been transported. It is true that the marital rights are not done away, yet that will not of necessity prevent the wife from becoming civilly liable. There are cases in which the spiritual courts and courts of equity have gone all the length now contended for, and this court has refused to grant a prohibition. *Chamberlain v. Hewson* <sup>(m)</sup>. The whole of the law which prohibits the husband from being made liable, or the wife from being charged separately, was introduced for the benefit of the husband: but here he has renounced the society of his wife by deed; he cannot reclaim her; he has given her a separate property; he has abandoned the whole benefit of his marital rights. There is no clear decision against the plaintiffs, and all the arguments of reason and of convenience are in their favour.

*Wallace* having been heard in reply,

Lord MANSFIELD delivered the opinion of the Court.— This is an action by a tradesman for goods sold to, and work and labour done for, the defendant. [His Lordship then stated the pleadings.] I state the pleadings, because the opinion we give will turn on all the circumstances of the case taken together; and what I say will only apply to a case situated exactly like the present. It has been truly

<sup>(l)</sup> *Co. Litt.* 132.

<sup>(m)</sup> *B. R., H. 7 W. 3,*  
*1 Salk.* 115.

stated, that by the common law the wife has no separate power of contracting. She has no property of her own; her personal estate absolutely, and her real estate during coverture, are her husband's; she, therefore, cannot contract, but he is bound to support her. General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law. The earlier cases, in the reigns of *Henry* the Fourth and *Edward* the Third, arose on the exile or abjuration of the husband. Lord COKE calls it a civil death, but it is not so. It does not dissolve the marriage bond, and it only resembles a civil death in conferring upon the wife a capacity to sue. In the reign of *Henry* the Sixth, another authority is found where the wife was allowed to maintain trespass. In the time of *William* the Third, the *Duchess of Masarine's* case occurred; and there HOLT, C. J. (n), said, that it did not differ from the case of the exile of the husband. Lastly comes the case before YATES, J., at *Carlisle* (I do not mention that before myself). He considered transportation within the reason of exile, although Lord COKE, confining himself to the letter, says that the exile must be for life. Can it indeed be held that a woman whose husband is transported or abroad cannot go into service and sue for her wages?

The question now is, Can the defendant avail herself of the plea of coverture against the plaintiffs' demand, or shall she be considered a *feme sole* when the debt was contracted? It is averred in the replication that the husband resided in *Ireland*; but it is not averred (as the fact was) that his estate was in *Ireland*, so I lay that out of the case. The agreement of separation bound both the parties in the same manner as if they had been sole, and the Court will not suffer either of them to break through it. Under this agreement the wife possesses a separate property. She is no longer under the control of her husband, and creditors even for necessities have no remedy against him. Credit was given to her as a single woman; and shall she now be permitted to say that she was not single? A case occurred before me at *Guildhall* of an action against a woman upon

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(n) Lord Raym. 147. See *Compton v. Collinson*, C. B., H. 30 G. 3, 1 H. Bl. 349.



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a bond. On *non est factum* pleaded, she attempted to set up the defence of coverture, but I would not allow it, for she had represented herself as a single woman, and executed the bond as such, and it did not lie in her mouth to say that she was married.

Upon the present question there is no case precisely in point; we must therefore make a precedent from reason and analogy. Two cases have been mentioned, decided in the Court of *Common Pleas*. In *Hatchett v. Baddeley* the wife had no separate maintenance; and it did not follow, from the word "elopement," that she lived in adultery. In the other case the Court was divided on the merits, and it appears that one judge did not coincide with the rest of the court. The ground on which that case was decided does not occur here; but I am inclined to say, that if *Lord Lanesborough* were now alive, and in *Ireland*, he need not be joined. This does not resemble the case of the *feme sole* trader in *London*, for there the husband is interested both in her person and in her stock in trade. The present bears a greater resemblance to the case of exile; than which, indeed, it is stronger. There, as here, the marriage is not dissolved: it subsists for every other purpose than that of the wife suing and being sued. As in the case of exile or abjuration, *Lord Lanesborough* was out of the kingdom, and not amenable to the process of our courts. We are of opinion that the case resembles abjuration or exile in every particular, that the wife therefore may be sued alone, and that she cannot avail herself of this most iniquitous defence.

Judgment for the plaintiffs (o).

(o) Although this case came under the consideration of the Court of *King's Bench*, in *Marshall v. Rutton*, 8 *T. R.* 554, by which it is generally supposed to have been overruled, yet that consequence does not appear necessarily to follow; for in *Marshall v. Rutton* there was no averment that the husband resided out of the jurisdiction of the *English* courts, as in the principal case. In the cases of *Barwell v. Brooks*, *B. R.*, *H.* 24 *G. 3*, *post*, and *Corbett v.*

*Poelnitz*, *B. R.*, *M.* 26 *G. 3*, 1 *T. R.* 5, the Court indeed held that the circumstance of the husband residing in this country made no difference.

The cases respecting the separate liability of a married woman may be classed under the following heads: 1. Where she is merely living separate; 2. Where she is living separate by consent, and with a separate allowance; 3. Where she is living separate, her husband being abroad; 4. Where she

is living separate; her husband being a foreigner, and resident abroad; 5. Where she is living separate, her husband being banished or transported; 6. Where she is living separate in adultery; 7. Where she has been divorced.

1. Where the wife is merely living separate, whether with or without the consent of her husband, it is clear that she cannot make herself liable to be sued as a *feme sole*; a position recognised in all the cases.

2. Where the wife lives separate by consent, and enjoys a separate allowance, it is now settled that she cannot render herself personally liable. *Marshall v. Rutton, ubi supra*. To this law there is, according to the principal case, an exception when the husband is residing out of the jurisdiction of the English courts.

3. Where the wife is living separate from her husband, who resides abroad, she cannot render herself liable by her own contracts, although the residence abroad of her husband be permanent. *Marsh v. Hutchinson, C. B., T. 40 G. 3, 2 B. & P. 226*; *Farrar v. Lady Granard, C. B., T. 44 G. 3, 2 Bos. & Pul. N. R. 80*. Nor can she in such case maintain an action as a *feme sole*. *Boggett v. Frier, B. R., T. 49 G. 3, 11 East, 301*.

4. Where the wife is living separate from her husband, who is a foreigner, residing abroad, the decisions differ as to her liability. In the *Duchess of Mazarine's case, B. R., H. 8 & 9 W. 3, 1 Lord Raym. 147*, it was held, that the Duchess, who had resided here twenty years, and whose husband was an alien enemy resident in France, was liable on her own

contracts. *Holt, C. J.*, said, "Where the husband is an alien enemy, and under an absolute disability to come and live here, the law perhaps will make the wife of such a husband chargeable as a *feme sole* for her debts and contracts." So in *Walford v. Duchess of Piennes, 2 Esp. N. P. C. 554*, where it appeared that the husband and wife, being foreigners, had come to this country; and that four years before the trial the husband had gone abroad, where he remained, Lord Kenyon said that the case came within the principle of the old common law, where the husband had abjured the realm; that if the husband had been absent for some time, and then returned, and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the wife not liable; but here was a desertion of the kingdom, and an absence of some years: he was no longer domiciled here, and in the interval his wife had been supplied with the articles; and if she was not held liable for debts contracted under such circumstances, she might be starved. In the same year another action was brought against the same defendant, and Lord Kenyon ruled the same way. *Franks v. Duchess of Piennes, 2 Esp. N. P. C. 587*. The Court of Common Pleas established the same doctrine in the case of *De Gailon v. L'Aigle, M. 39 G. 3, 1 B. & P. 8 & 357*, *HEATH, J.*, observing, "The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the *feme covert* that she should be liable to an action in such a case as this; otherwise she could obtain no credit, and would have

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no means of gaining her livelihood. The husband perhaps never was in *England*, and never may be; so that this case is not at all like those which proceeded on the ground of a separate maintenance." In *Kay v. Duchess of Pienne*, 3 *Campb. N. P. C.* 123, however, Lord ELLENBOROUGH expressed himself dissatisfied with these opinions. There the *Duke* and *Duchess de Pienne* had lived in *England* as man and wife till 1803, when the *Duke* went abroad and entered into the service of *Sweden*, where he had remained. Lord ELLENBOROUGH said, "If the husband has never been in this kingdom, the wife of an alien, I think, may be sued as a *feme sole*. This is the *Duchess of Mazarine's* case. I don't know whether it was distinctly brought to Lord KENYON's attention, that the *Duke de Pienne* had been living with the defendant as his wife within this realm. If so, I cannot subscribe to his opinion. But, at the time of those decisions, *Ringsted v. Lady Lanesborough*, and *Corbett v. Poelnitz*, had not been judicially overturned. Since the case of *Marshall v. Rutton*, which restored the old common law on this subject, I consider it quite clear that a married woman, under the circumstances of the present defendant, is not liable to be sued as a *feme sole*. When the husband has abjured the realm, or been exiled, he cannot return, and the case stands upon perfectly different principles."

5. Where a married woman is living separate from her husband, who has been banished or transported, she is liable to be sued as a *feme sole* until the actual return of her husband. Abjuration or exile is a civil

death. *Co. Litt.* 133 a, *Wilnot's case*, *Moor*, 851. Thus, where the husband of the *Lady Sandys* was banished, during life, by act of parliament, the Court were of opinion that she might in all things act as a *feme sole*, as if her husband were dead; that the necessity of the case required she should have such power, and that a will made by her was good. *Countess of Portland v. Prodggers*, *Canc.* 1689, 2 *Vern.* 204. See also *Newsome v. Bowyer*, *Canc.* 1729, 3 *P. Williams*, 37. This law was extended to the case of transportation by the two decisions of Lord MANSFIELD and Mr. Justice YATES mentioned in the text; and Lord ALVANLEY ruled, that though the period of the husband's transportation had expired, yet if in fact he had not returned, his wife might sue as a *feme sole*. *Carroll v. Blencow*, 4 *Esp. N. P. C.* 27. This point is adverted to by Lord ELDON, *C. J.*, in *Marsh v. Hutchinson*, 2 *B. & P.* 232, and appears to have been considered by him as a question of much doubt.

6. Where the wife lives separate from her husband, and in adultery, she cannot be sued as a *feme sole*. *Gilchrist v. Brown*, *B. R.*, *T.* 32 *G.* 3, 4 *T. R.* 766. See also *Hatchett v. Baddeley*, *C. B.*, *E.* 16 *G.* 3, 2 *W. Bl.* 1079.

7. Where a woman has been divorced merely *a mensâ et thoro*, the relation of marriage still subsists, and she is liable to be sued as a *feme sole*. *Lewis v. Lee*, *B. R.*, *T.* 5 *G.* 4, 3 *B. & C.* 291; but it is otherwise where she is divorced *a vinculo matrimonii*.

Where the wife is the party really interested, and has a separate maintenance, the proper

course for her is to sue in her husband's name; and the Court will not stay the proceedings on the application of the defendant, and will set aside a plea of release by the husband. *Chambers v. Donaldson, B. R. E. 48 G. 3, 9 East, 471; Innell v. Newman, B. R. E. 2 G. 4, 4 B & A. 419.*

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**THE KING v. TUNWELL, MAYOR OF CAMBRIDGE (a).**

**A** RULE had been obtained, by *Partridge*, to show cause why an information, in the nature of a *quo warranto*, should not be exhibited against the defendant, to show by what authority he claimed to be mayor of *Cambridge*. It appeared by the affidavits, that, by a charter of James I., the borough was incorporated by the name of the mayor, bailiffs, and burgesses of *Cambridge*, and the mayor to be elected out of the burgesses. This charter was confirmed by Charles I. The custom in the borough had been always to elect the mayor out of the aldermen, of whom there are twelve besides the mayor. In 1699 a by-law was made, whereby it was declared, that, for the future, no alderman should be eligible into the office of mayor who had served that office within six years next before the election; and a penalty was imposed on the persons electing him mayor within that time, and on him for accepting the office. This by-law had been acquiesced in from the time of the making of it till the month of *August*, 1782, when *Tunwell* was elected mayor, and entered on his office, although he had been mayor before within six years, viz. in 1778. It was therefore said, that on the by-law of 1699 he was not eligible, and this rule for an information was applied for.

Friday,  
31st January.  
A corporation cannot by a by-law narrow the number of persons eligible to corporate offices.

*Wallace* and *Wilson*, against the rule, contended that the by-law was clearly bad, as restraining the number of persons out of whom the election was to be made as appointed by the charter, which a by-law could not do, although it might narrow the number of electors for the sake of avoiding popular confusion. *Case of Corporations (b)*. This by-law narrowed the number of persons out of whom the election was to be made, for out of twelve it excluded six; and it was therefore expressly within the rule laid down in *R. v.*

(a) *S. C.* cited 2 *Selv. N. P.* 1083, 4th ed.

(b) *M. 40 & 41 Eliz. 4 Co.* 78.

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*Phillips, Mayor of Carmarthen* (c), *Lee v. Wallis* (d), and *R. v. Spencer* (e). If the point were doubtful, the Court would not decide it in this stage; but as it is completely settled, the rule must be discharged.

*Bearcroft, Partridge, Graham, and Le Blanc, contra*.—The corporation have for eighty years submitted to this by-law, which is in itself a sufficient ground against a decision in this stage of the question. According to the *Case of Corporations*, the number of the electors may be narrowed; and that decision goes the whole length of this case. There is no distinction, in principle, between the narrowing the number of the electors and of the eligible. The restraint is only *sub modo*, and for a time; in which respect this case differs from those which have been cited. In *R. v. Phillips* the by-law removed for ever from the office of mayor all the common burgesses who were eligible by the charter; and in *Lee v. Wallis* the election was restrained to eight persons nominated by the warden. Here no permanent incapacity was inflicted on any body. The by-law is neither against public policy nor contrary to the charter, which only says that a burgess shall be elected. They cited *Butler v. Palmer* (f), and *London City v. Vanacher* (g).

LORD MANSFIELD.—Where there is any question of law or fact in dispute, the Court will grant an information to put it in a more solemn form of determination; but where the Court see no doubt, especially in point of fact, they should not send it to trial. Here there is no doubt either as to the law or as to the fact. The law is plain, that a corporation cannot give themselves a new constitution. In the *Case of Corporations* much might have been said as to the giving a new constitution; but that case was determined on sound policy, to avoid popular confusion, and care has been taken ever since to prevent that case from being carried further. The law is clearly settled in *R. v. Phillips* and *Lee v. Wallis*, which have been considered in subsequent cases. The decision in *Salkeld* is quite different.

ASHURST, *Justice*.—The question is the same as if the

(c) *B. R.*, T. 22 G. 2, cited  
 3 *Burr.* 1833; *B. N. P.* 211;  
*Selw. N. P.* 1083, 4th ed. S. C.  
 (d) *B. R.*, H. 29 G. 2, cited  
 3 *Burr.* 1833; 1 *Kenyon*, 292;  
*Sayer*, 263, S. C.

(e) *B. R.*, H. 6 G. 3, 3 *Burr.*  
 1827.  
 (f) *B. R.*, T. 11 *Will.* 3, 1  
*Salk.* 190.  
 (g) *B. R.*, E. 11 *Will.* 3,  
*Carth.* 480.

by-laws had been made yesterday. The case of *R. v. Phillips* is decisive.

BULLER, *Justice*.—There is no distinction between this case and that of *R. v. Spencer*. *R. v. Phillips* was argued several times, and settled the point, that the number of the eligible cannot be narrowed, although, according to the case in *Coke*, it is otherwise with regard to the number of the electors.

Rule discharged (*h*).

(*h*) See *The King v. Tappenden, B. R., M. 43 G. 3, 3 East, 186.*

1783.

THE KING  
v.  
TUNWELL.

ROE on the demise of DAVIS, v. KENT and Another.

THIS was an action of ejectment, on the trial of which it appeared in evidence that *Oliver Silverthorpe* the elder, in his lifetime, was in wrongful possession of the estates for which the ejectment was brought, and which belonged to his son *Oliver Silverthorpe* the younger. That after receiving the rents and profits of the estates he died, on the 15th of *January, 1770*, and devised the estates to his two nephews, whom he also appointed executors of his will. That on the 31st of *January, 1770*, the devisees received the rent which had accrued due in the time of the testator, for which they gave receipts. That in *Trinity Term, 1770*, the devisees levied a fine of the estates; and that in *December, 1770*, they received the rents of the estates on their own account. The lessor of the plaintiff was the heir-at-law of *Oliver Silverthorpe* the son; and the question was, whether the receipt of rent by the devisees was, under the circumstances, a sufficient wrongful possession to support the fine. The jury were of opinion that it was sufficient, and found a verdict for the defendant. A rule *Nisi* having been obtained for a new trial,

*Bearcroft* and *Bower* showed cause.—The objection is, that, as the first receipt of rent in *January* was, *eo nomine*, received by the devisees in their capacity of executors, and that as the next receipt, in *December*, was after the levying of the fine, there was nothing to show that the devisees, at the time of the fine levied, were in possession. The answer is, that the possession of the tenant was the possession of

Friday,  
31st January.

*A. S.* being in wrongful possession of certain estates, devised them to his two nephews, whom he appointed executors. The nephews received the rent due in the testator's time, and afterwards levied a fine of the estates. After the levying of the fine, they received the rents accruing in their own time. Held, *WILLES, J., dubitante*, that it was rightly left to the jury to say whether the nephews had a sufficient wrongful possession to support the fine; and the jury having found it sufficient, the Court refused to interfere.

1783.

ROB,  
dem.  
DAVIS,  
v.  
KENT.

the devisees. The same person continued tenant who was tenant to *Oliver Silverthorpe* the father, who was a disseizor; and he continued to be the tenant of those who claimed under him. *Co. Litt.* 237. The receipt of rent is only evidence that the tenant of the land holds under another. Here the second receipt of rent, though subsequent to the fine, is evidence that the devisees assented to the devise, and affirms their title under the will from the death of the testator. If this fine is not good, no fine can be so unless the conusor is in the manual occupation of the land.

*Wallace, A. G. and Haworth, contra.*—*Silverthorpe* the father took possession of his son's estate, and continued in possession till his death, when he devised it from his son to his two nephews, whom he made his executors. At his death a year's rent was due from the *Michaelmas* preceding, which could only be received by the devisees in their character of executors. This, then, was no possession. Afterwards, in *Trinity Term*, without any attornment on the part of the tenants, they levied a fine. It is clear, that without possession that fine will not operate as a bar by way of non-claim. *Atkins v. Horde (a)*. At the *Michaelmas* following the devisees received the rent accruing in their own time; but the fine must be complete when it is levied, and the rights of other parties divested then, or not at all. It cannot depend on any after act of the tenant whether the fine shall be good or not; nor will the Court make an act relate back unless to perfect a rightful title. Such a fine may, it is true, operate as a conveyance, and bind the parties and their privies, *Shep. Touch.* 23, but it can have no effect as a bar by way of non-claim.

LORD MANSFIELD.—It was left as a matter of fact to the jury, whether there was not evidence of an agreement after the death of the testator, between the devisees and the tenant, that the latter should become tenant to the former. The parties met soon after the death of the testator, and at the end of the year the tenant paid the rent. This was evidence from which the tenant might presume such an agreement.

WILLES, *Justice*.—I doubt whether the possession was altogether a matter of fact, and to be left to the jury. I incline to think that it was matter of fact mixed with matter of

(a) *B. R.*, II. 30 G. 2, 1 *Burr.* 60.

law, and that it should have been so stated to the jury by the Court. The payment in *January* only admitted a tenancy to the disseizor, and not to the executors; and to make the second payment relate back is a fiction.

ASHURST, *Justice*.—This seems to me to be matter of fact proper to be left to the jury; and the jury have found that the payment of rent at *Michaelmas*, 1770, was an acknowledgment that the tenant held during the preceding year.

BULLER, *Justice*.—I think the fine was a bar on two grounds: first, the freehold was in the devisees before entry, *Co. Litt.* 35, 36, 111 a; and if the actual freehold was in him the fine was well levied. If the freehold were not in the devisee before entry, there would be great inconvenience. Leases are sometimes made without any reservation of rent for several years: must the devisee then institute a suit to compel attornment? But, secondly, I think there was evidence to show an agreement on the part of the tenant to become tenant to the devisees. Whether the possession was sufficient is a question of law, what was the possession is a question of fact. The payment at *Michaelmas* is a strong piece of evidence to show that the tenant was all the time tenant to the devisees. As to the relation, there is a strong *dictum* in *Leonard (b)*.

Rule discharged.

(b) 3 *Leon.* 227.

MORTON v. FENN.

THIS was an action for breach of promise of marriage, tried before Lord MANSFIELD. The evidence was, that the defendant, who was a man of fortune, in *Jamaica*, aged seventy, promised to marry the plaintiff, a widow of fifty-three, if she would go to bed to him that night, which she did, and lived afterwards with him a considerable time. It appeared also that the defendant several times afterwards repeated his resolution to marry her, but that he afterwards married another woman. The jury found a verdict for the plaintiff with £2000 damages. A rule *Nisi* for a new trial having been obtained, on the ground that it was *turpis con-*

is not such a *turpis contractus* as to prevent the plaintiff from recovering.

1783.

ROE,  
dem.  
DAVIS,  
v.  
KENT.

Saturday,  
1st February.

Action for breach of promise of marriage. It appeared that the first promise was made by the defendant in consideration that the plaintiff would go to bed with him, which she did; but there was evidence of subsequent promises. *Scmble*, that this



1783.  
 ~~~~~  
 MORTON
 v.
 FENN.

tractus, being on condition of the plaintiff going to bed with the defendant, Lord MANSFIELD said, I thought the objection would not lie on two grounds: 1. That before the marriage-act this would have been a good marriage, and the children legitimate by the rules of the common law; 2. I thought so because the parties were not *in pari delicto*, but this was a cheat on the part of the man.

Erskine now showed cause (a).—The Court will pause before they determine that an action cannot be maintained where there has been a seduction. It is absurd, that where the defendant has been guilty of no crime he shall be liable to an action, but that where he has been guilty of the grossest seduction he shall go free. In the present case, moreover, there were subsequent promises made in consideration of the defendant's good opinion of the plaintiff, which are not affected by the consideration of the first promise, even supposing that to be base. There are many cases in equity where prior cohabitation has been held not to vacate the security. As to the damages being excessive, the principle upon which a new trial is granted upon that ground is, that, in pecuniary contracts, the Court will see that the jury do not go beyond the clear meaning of the parties; but that in actions for torts, to which there is no measure affixed by law, the jury have the sole province of estimating the damages. He cited *Turner v. Vaughan* (b), and the case referred to there by BATHURST, J.

Wallace and Baldwin, contra.—No case has been, or can be, mentioned, in which any court, ecclesiastical or other, has held a marriage good founded only on a promise like the present. Since the marriage-act this is no longer a marriage, nor capable of being enforced, but is simply fornication. The cases in equity mentioned on the other side are on securities given, and the party comes to pray relief against his own security—a very different question from the present. This is not like the case where, after a promise of marriage, a man succeeds in seducing a woman: it is here a condition. What are called the subsequent promises occurred only in conversations with third persons, and not in the presence of the plaintiff. As to the enormity of the

(a) See the popular report of his speech. "Speeches of Lord *Erskine, when at the Bar, on* *Miscellaneous Subjects*," p. 81.
 (b) C. B., E. 7 G. 3, 3 *Wils.* 339.

damages, they are such as to argue a partiality in the jury, and an improper influence. There is therefore ground for sending back the case to be reconsidered.

The Court took time to consider, and in the meanwhile recommended the parties to agree that the defendant should pay the plaintiff £500; and, on a subsequent day, *Wallace* informed the Court that the parties had consented to that arrangement.

1783.

MORTON

v.
FENN.

CARRICK v. VICKERY.

(*Reported ante*, vol. ii. p. 653, n.)

Saturday,
1st February.

HIDE v. BRUCE.

THIS was an action upon a policy of insurance on goods, lost or not lost, at and from *Leghorn to Gibraltar*. There was a warranty in the policy that the ship had twenty guns. It appeared in evidence that she had twenty guns, but only twenty-five men, and that it required sixty men to man twenty guns. It was contended for the defendant that the warranty implied that there should be a proportionable number of men. A verdict was given for the plaintiff; and a rule having been obtained for a new trial,

Wallace, A. G., and *Lee*, showed cause.—There is no implied warranty as to men, nor could it be so intended, for the ship was in a foreign port, and the captain could not get as many men as he pleased. The construction contended for on the other side would make a warranty extend to implications.

Cowper, contra.—This was a warranty that the ship was a ship of the force of twenty guns. Was she a ship of that force? It is not necessary to contend that this was a warranty of guns, and also a warranty of men; but it was a warranty of the number of guns, and a representation that she had a reasonable quantity of men in proportion to the guns. For the purposes of fighting, twenty-five men were quite useless, for seventeen or eighteen would be necessary to work the ship while in action. Yet, in consequence of

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1st February.

Warranty that
a ship had
twenty guns. It
is no breach of
the warranty,
that she had
only twenty-five
men, and that
it required sixty
men to man
twenty guns.

1783.

HIDE

v.

BRUCE.

this warranty of force, she is permitted to chase and go into danger, to take prizes, and to weaken herself still further. There has therefore been a misrepresentation, by which the policy is avoided.

Lord MANSFIELD.—A warranty makes a contingency, without which the contract is void. But a representation, if true, is not to have the same effect unless there is fraud.

WILLES, ASHURST, and BULLER, *Justices*, were of the same opinion.

Rule discharged.

Monday,
3d February.

In an action on the game laws for several penalties, the defendant may pay one penalty into court, the plaintiff being at liberty to go on for the others.

HARCOURT v. KNAPP (a).

ACTION on the game laws for several penalties. *Chambre* moved for a rule to show cause why, on payment by the defendant of one of the penalties into court, all proceedings in the action should not be stayed. BULLER, *J.*, said, that the Court would give him leave to pay one penalty into court, but that the plaintiff must be at liberty to go on for the rest. And on *Chambre's* stating that a similar application had been granted in a former case, the Court said that it could only have been by consent.

(a) *S. C.* cited 1 *Tidd's Pr.* 586, 8th ed.

Wednesday,
5th February.

Where a bankrupt applies to be discharged out of custody on the ground that he has obtained his certificate, if the plaintiff in the action disputes the trading, the Court will direct an issue to try that fact.

YEO v. ALLEN (a).

THE defendant obtained a rule to show cause why he should not be discharged out of custody on filing common bail, on the ground that he was a bankrupt, and had obtained his certificate.

Wallace showed cause.—The defendant is not a trader subject to the bankrupt laws. He was a receiver-general of the land-tax, and as such, by 5 *G. 2, c. 30, s. 40*, not subject to be made a bankrupt. The plaintiff also disputes the act of bankruptcy and the petitioning creditor's debt. He has

A scrivener is one who lends out money for others for a commission.

(a) *S. C.* cited 1 *Tidd's Pr.* 211, 8th ed.

petitioned the Chancellor to supersede the defendant's commission, but the petition is not yet determined, and he has elected in *Chancery* to pursue his remedy at law. The plaintiff is willing to try an issue on the trading and the petitioning creditor's debt.

1783.

YEO
v.
ALLEN.

Haworth, contra.—The statute of *Geo. 2.* only excepts receivers-general as such. The defendant was found to be a trader by receiving the money of others and lending it out, which is acting as a scrivener, and a scrivener is liable to be made a bankrupt. The defendant is entitled to be discharged by the 5 *G. 2, c. 30, s. 13*, which authorises the Court, on the bankrupt's producing his certificate allowed and confirmed, to order his discharge; and by *s. 7*, which makes the certificate evidence of the trading and bankruptcy.

The Court did not give any opinion whether the trading was so connected with the defendant's office of receiver-general as to come within the exception in the statute of *Geo. 2*, but they were clear that he did not appear to be a money-scrivener; to which it was essential that he should lend out money for others for a commission.

Wallace cited *Willison v. Smith (b)*, in which the Court had directed an issue.

Lord MANSFIELD.—There is no colour on the proceedings for the defendant being a trader. Take an issue in which the only question is to be on the trading; the petitioning creditor's debt and the act of bankruptcy not to be disputed. That must be an admission, and the issue must be in the common form, whether the commission duly issued. And let it be understood, that if there is a verdict for the defendant to the satisfaction of the judge, he shall be discharged next day.

Rule discharged on undertaking accordingly (c).

(b) *B. R., E. 22 G. 3, ante, B. R., H. 58 G. 3, 1 B & A. p. 96.* 332, where the Court held the

(c) See *Woolcot v. Leicester, C. B., H. 55 G. 3, 6 Taunt. 75;* certificate evidence of all the previous proceedings.
but see also *Harmer v. Hagger,*

1783.

Wednesday,
5th February.

In an action for a libel published in a newspaper, the Court will not change the venue to the county in which the paper was published.

HOSKIN v. RIDGWAY (a).

BALDWIN moved to change the venue from *Gloucestershire* to *Middlesex*, in an action for a libel in a newspaper published in *Middlesex*, on the usual affidavit, that the cause of action arose in *Middlesex*, and not in *Gloucestershire* or elsewhere out of *Middlesex*. The Court said that the newspaper was published in every county in *England* as well as in *Middlesex*, where it was printed; and **BULLER, Justice**, added, that if the party reflected on resided in *Gloucestershire*, the action would be more properly tried in that county than in *Middlesex*.

Motion denied (b).

(a) *S. C.* cited 1 *T. R.* 572; only, the Court will change the venue to that county. *Freeman*

1 *Tidd's Pr.* 654, 8th ed. *v. Norris, B. R., E.* 29 *G.* 3, 3 *T. R.* 306; *Aris v. Taylor, Cumming v. Naylor, Scacc., H. B. R., T.* 35 *G.* 3, 1 *Tidd's* 8 & 9 *G.* 4, 2 *Y. & J.* 110. But *Pr.* 654, 8th ed.; *Metcalf v. Markham, B. R., E.* 30 *G.* 3, 3 *T. R.* 652.

Wednesday,
5th February.

THE KING v. THE JUSTICES OF PETERBOROUGH.

(Reported, Caldecott, 238.)

Wednesday,
5th February.

THE KING v. FRANKLYN.

(Reported, Caldecott, 244.)

Wednesday,
5th February.

THE KING v. COMPTON & AL.

(Reported, Caldecott, 246.)

Saturday,
8th February.

THE KING v. INHABITANTS OF SEAGRAVE.

(Reported, Caldecott, 247.)

1783.

THE KING v. INHABITANTS OF SWALCLIFFE.

(Reported, Caldecott, 248.)

Saturday,
8th February.

THE KING v. ABBOTT.

(Reported, ante, vol. ii. p. 553.)

Wednesday,
12th February.

BUTLER v. GRUBB (a).

Wednesday,
12th February.

RULE to show cause why the master should not tax the defendant his costs. The cause had been referred, at the trial before Lord MANSFIELD, and the costs were to abide the event. The defendant was within the jurisdiction of the *Court of Requests* for the borough of *Southwark*. The arbitrator awarded that there was only £1 17s. due, and stated that no evidence of a set-off was offered.

Where a cause is referred to arbitration, and the costs are to abide the event, the defendant is entitled to them if it appear by the award that the plaintiff's demand is under 40s., which he might have recovered in a court of conscience.

Peckham showed cause.—This case resembles the case of a judgment by default, where the defendant will not be allowed to make a suggestion on the roll for the purpose of entitling himself to costs. *Brampton v. Crabb* (b).

Haworth, contra.—The costs abiding the *event* means the legal event of the award; and therefore, where an executor is plaintiff, he is not liable. *Highman v. Hassell* (c). The effect of this award is the same as if the plaintiff, on the trial, had recovered less than 40s.

Per Cur. There is nothing in the case. Let the rule be made absolute (d).

(a) S. C. cited 2 *Tidd's Pr.* 884, 8th ed., 3 *T. R.* 139.

(d) See *Swinglehurst v. Altham*, *B. R.*, *H.* 29 G. 3, 3 *T.*

(b) *B. R.*, *H.* 3 G. 1, 1 *Str.* 46.

R. 138; *Day v. Mearns*, *B. R.*, *T.* 1816, 2 *Chitty's R.* 156; 2

(c) *B. R.*, *H.* 15 G. 3, cited 3 *T. R.* 139.

Tidd, 884, 8th ed.

C A S E S
ARGUED AND DETERMINED
 IN THE
COURT OF KING'S BENCH,
 IN
EASTER TERM,

IN THE
 TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.*

1783.

Tuesday,
 13th May.

Action on a promissory note made in favour of one *J. M.* Plea, the statute of usury. Replication, protesting the corrupt agreement between defendant and *J. M.*, states, that defendant did not, in pursuance of any such corrupt agreement, nor for any such purposes as are in the plea mentioned, make the note, and concluding to the country. Special demurrer, on the ground

MULLINER v. WILKES (a).

THIS action was brought on a promissory note for £290, made by the defendant in favour of *John Maberley*, and indorsed to the plaintiff. The plea was the statute of usury, pleaded as in *Smith v. Dovers* (b). Replication:—because, protesting that no such corrupt agreement was ever made between the said *John Maberley* and the said *J. Wilkes* as in that plea is mentioned, for replication in this behalf, the said *T. Mulliner* says, that the said *J. Wilkes* did not, in pursuance of any such corrupt agreement, nor for any such purposes as are in the said plea mentioned, make and deliver to the said *J. Maberley* the said promissory note in that plea and in the said first count of the said declaration mentioned, in manner and form as the said *J. Wilkes* has above, in that plea, alleged; and of this the said *T. Mulliner* puts himself upon the country, &c. Demurrer and causes assigned that the replication

that the replication should have concluded with averification, and so held.

* During the whole of this term Mr. Justice ASHURST was absent in the Court of Chancery.

(a) *S. C.* cited 2 *T. R.* 441.

(b) *B. R.*, *T.* 20 *G.* 3, ante, vol. ii. p. 428.

ought to have concluded with a verification; that it put several matters in issue; that it does not allege the note to have been given for any valuable consideration; and that the replication should have concluded, "And this he, the said *T. Mulliner*, prays may be inquired of by the country." Joinder in demurrer.

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Lawrence, for the demurrer, said, that the cause of demurrer upon which he meant to insist was, that the replication ought to have concluded with a verification. He said that the rule was, that where the whole contents of the plea were denied, the conclusion must be to the country; but that where a particular fact only is denied, there it must conclude with a verification: that here the whole contents of the plea were not denied, but that a particular fact was selected. He cited *Smith v. Dovers* (c) as expressly in point.

Law, contra.—There are a great variety of cases on this subject. Of these, *Crogate's* case (d) is the first. Where all the facts of the plea are put in issue, the replication may conclude to the country; but where the replication introduces new matter, it must conclude with a verification. This was the case in *Baynham v. Matthews* (e), where the replication was, that the note was given for a just debt, *absque hoc quod corrupte agreeatum fuit modo et forma*. That the note was given for a just debt was new matter, for the note was not necessarily given for a debt. So in *Smith v. Dovers* the replication stated that the bill was drawn and delivered to the plaintiff for a good and valuable consideration, which was new matter. The true difference between that case and the present is, that here the replication contains a denial of all the facts in the plea. It is as general as the replication, *de injuria*, &c. It is more proper than the usual issue on the corrupt agreement; for there may have been a corrupt agreement, and yet the note may not have been given in pursuance of it; but here the issue is that the note was not given in pursuance of any such corrupt agreement, nor for any of the purposes in the plea mentioned. This is a complete denial of the whole plea. [BULLER, J.—You have protested against the corrupt

(c) *B. R.*, T. 20 G. 3, *ante*, *Rep.* 67.
 vol. ii. p. 428. (e) *B. R.*, T. 4 G. 2, 2 *Str.*
 (d) *B. R.*, M. 6 Jac. 1, 8 871.

1783.
 ~~~~~  
 MULLINER  
 v.  
 WILKES.

agreement, and therefore for the purposes of this replication you admit it. The plea contains two parts, and you have put only one in issue.]

*Lawrence*, in reply.—If the whole of the plea had been put in issue, there would have been no use in the protestation. [Lord MANSFIELD inquired from *Law* what was the use of the protestation. *Law* said, that he thought it frivolous, and of no use; that it was an exclusion of a conclusion in another action. BULLER, J.—The use of a protestation is, to prevent the matter from operating as an admission in another cause; but in the cause in which it is used it admits the matter.]

BULLER, *Justice*.—The case most like the present, in favour of the plaintiff, is the replication to the plea of accord and satisfaction: but the true rule is, that wherever you put in issue the whole plea, you must conclude to the country (*f*); but where you select part only, you must conclude with an averment (*g*). Here there are two facts in the plea,—the corrupt agreement, and the note given in consequence of it. One fact is admitted, and the other alone denied. I have often wondered at what DENISON, J.,

(*f*) See *Boyd v. Whitaker*, B. R., H. 19 G. 3, ante, vol. i. p. 97.

(*g*) It is observed by Mr. Sergeant Williams (1 Saund. 103 *b* (n)), that this rule, that where a particular fact is selected and denied the conclusion must be with an averment, is not universally true, and that many instances may be mentioned where the conclusion in such case must be to the country. He then mentions the case of an avowry that the plaintiff held the premises from such a time under a certain demise, and that so much rent was in arrear; in which case the plea denying that any rent was in arrear must conclude to the country. So, he adds, where to a plea of accord and satisfaction (the case referred to by BULLER, J.) the replication de-

nies that the plaintiff received in satisfaction, it must conclude to the country; and other instances might be mentioned. In the notes of Mr. Wilson, the following instances are stated to have been collected by Mr. Gibbs: 1. *De injuria sua propria absque residuo causæ*; 2. Plea to covenant, that defendant has repaired, though the deed remains undenied; 3. Plea by an assignee, denying the assignment; 4. To a general avowry for rent under the statute, a plea denying the holding only; 5. To a plea of payment accepted in satisfaction, a replication that the defendant did not pay in satisfaction; 6. To a like plea, replication protesting against the payment, and denying the acceptance in satisfaction. *Lilly*, 121.

said in *Robinson v. Rayley* (h), and have thought it not to be supported on any principle (i). There is no case which says that a traverse with an inducement should not conclude to the Court (k), therefore that is the safer way.

After a great deal of conversation between the Court and the bar, *Law* had leave to amend the replication by striking out the protestation and concluding with a verification.

1783.

MULLINER  
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WILKES.

(h) *B. R., E. 30 Geo. 2, 1 Burr. 320.*

(i) The part of DENISON, J.'s judgment referred to by BULLER, J., is as follows: "He cited a case (of an alternate way of traversing a corrupt agreement), which was in *M. 5 G. 1, B. R., Fenn v. Alston*, where it was holden that the plaintiff has a liberty either to reply that the bond was given upon another account, and to traverse the corrupt agreement with an *absque hoc*, or to deny the corrupt agreement directly, and conclude to the country. And the case of *Baynham v. Matthews, 2 Str. 871*, goes upon the very same foundation, and mentions the same alternative." In *Hedges v. Sandon, B. R., E. 28 Geo. 3, 2 T. R., 443*, on the principal case being cited, BULLER, J., observed, "It is said that I expressed a doubt in the case of *Mulliner v. Wilkes* whether what was said by DENISON, J., of *Baynham v. Matthews*, viz. that the conclusion is proper either way, was correct; but I am now satisfied that what he said was right." See *1 Saund. 103 c(n); Bush v. Leake, B. R., T. 23 G. 3, post; Slater v. Carne, H. 25 G. 3, post*, vol. iv.

(k) The true principle upon which it has been held that a traverse with an inducement

must conclude with a verification is explained by Mr. Sergeant Stephen in his excellent *Treatise on the Principles of Pleading*, p. 203, 1st edit.: "With respect to the verification, this conclusion was adopted in a special traverse in a view to another rule, viz. that wherever new matter is introduced in a pleading, it is improper to tender issue, and the conclusion must consequently be with a verification. The inducement, setting forth new matter, makes a verification necessary, in conformity with that rule." And again: "To this exception belongs the case formerly noticed of special traverses. These, as already explained, never tender issue, but always conclude with a verification; and the reason seems to be, that in such of them as contain new matter in the inducement, the introduction of that new matter will give the party a right to be heard in answer to it if the *absque hoc* be immaterial, and consequently makes a tender of issue premature. And on the other hand, with respect to such special traverses as contain no new matter in the inducement, they seem, in this respect, to follow the analogy of those first mentioned, though they are not within the same reason." P. 251.

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THE KING v. THE INHABITANTS OF HOPE MANSELL.

(Reported, Caldecott, 252.)

Saturday,  
17th May.

THE KING v. THE INHABITANTS OF ST. NICHOLAS,  
GLOUCESTER.

(Reported, Caldecott, 262.)

Saturday,  
17th May.

THE KING v. THE INHABITANTS OF MITCHAM.

(Reported, Caldecott, 276.)

Monday,  
19th May.

HOSKINS v. PICKERSGILL (a).

An insurance upon a ship employed in the *Greenland* trade on "ship, tackle, apparel, and furniture," does not, by the usage of the trade, cover the fishing-tackle.

THIS was an action on a policy of insurance at and from *London to Greenland*, during the ship's stay there, and back again, on ship, tackle, apparel, and furniture, in the usual way. At the trial before Lord MANSFIELD, a question arose whether the fishing-tackle for the *Greenland* trade was covered by the above general words of the policy. There was contradictory evidence as to the usage in the *Greenland* trade of insuring the tackle in express terms. Lord MANSFIELD said, that no doubt the boat's rigging and stores belonging to the ship were included; but that as to the fishing-stores, it must depend upon the usage of the trade, the evidence of which was contradictory. A verdict having been found for the plaintiff, a rule was obtained to show cause why there should not be a new trial.

*Baldwin* showed cause, and contended that this was a question of usage properly left to the jury on the contradictory evidence; and that as the jury had decided it, the Court would not interfere.

(a) S. C. cited *Park Ins.* 77, 6th ed.; *Marshall Ins.* 727, 2d ed.

*Lee, S. G., contra.*—The insurance was for £2000, and the ship alone was worth more than that sum; and the evidence of the usage of trade was very strong in favour of the defendants. The plaintiff's own witness stated that the custom of late years had been to insure the fishing-tackle separately.

Lord MANSFIELD.—The jury seem to have had some knowledge of the subject themselves, for certainly the weight of evidence was with the defendant.

WILLES, *Justice.*—The evidence is certainly in favour of the defendant, and I think it a proper case for a new trial.

Rule absolute, on payment of costs (b).

(b) So in a late case a *London* jury found in a special verdict, that "According to the usage of trade, where policies of insurance have been effected on ships, their tackle, apparel, munition, and furniture, which ships are employed in the *Greenland* fisheries, and losses have happened to such ships and their fishing-stores, such stores have not been, and are not, covered by such policies." *Gale v. Laurie*, *B. R.*, *H.* 6 & 7 *G.* 4, 7 *Dowl. & Ry.* 711; *S. C.*, 5 *B. & C.* 159. It is said by Lord ELLENBOROUGH, in *Hill v. Patten*, *B. R.*, *E.* 47 *G.* 3, 8 *East*, 375, that the word *outfit* in a policy on a fishing-voyage includes the apparatus and instruments necessary for the taking of fish, seals, &c. and the disposing of them, when taken, in such a manner as to bring home the oil, blubber, bones, skins, and other animal produce of the adventure, with the greatest convenience and advantage. In the *United States of America* the different interests in fishing-voyages are universally described as consisting of the ship, the outfits, and the cargo. *Phillips on Insurance*, 72.

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GILL.

LEDGWICK v. CATCHPOLE.

(Reported, *Caldecott*, 291.)

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Wednesday,  
21st May.

Sailing under the protection of an armed ship, not appointed by government as the convoy, is not a compliance with a warranty to depart with convoy. The general rule is, that in order to constitute a sailing with convoy, sailing orders must be obtained.

HIBBERT v. PIGOU (a).

THIS was an action upon a policy of insurance on the ship *Arundel*, from *Jamaica* to *London*, warranted to depart with convoy. At the trial before Lord MANSFIELD, the following facts appeared:—Lord Rodney, having sailed for *England*, left orders with *Admiral Graves* to go to *Bluefields* and take under his command ten ships of the line which were to assemble there, and proceed with the convoy to *England*. *Admiral Graves*, on the twenty-sixth of *July*, having then five ships of the line and fifty-one merchantmen, sailed from *Bluefields*, leaving no orders for the other ships. On the twenty-eighth of *July*, the *Arundel* arrived at *Bluefields* with the *Jason* and *Glorieux* (b), *Captain Cadogan*, armed ships. Finding the convoy gone, *Captain Cadogan*, who had no other orders than the order to put himself under *Admiral Graves*' command, knowing that the admiral was going to *England*, sailed on that day or the next in quest of the fleet. The captain of the *Arundel* applied to *Captain Cadogan* for sailing orders: he said that he had none, but that if they did not overtake the fleet he would make out the orders. The *Glorieux* acted as convoy, and brought the *Arundel* into the middle of the fleet, off *Cape Antonio*, in *Cuba*, on the fifth of *August*, where she received sailing orders from *Admiral Graves*. It was proved that the *Glorieux* was part of the convoy, and that *Admiral Rodney* had ordered every ship of war going to join the convoy to take under its protection such ships as it should meet with. The *Arundel* was separated in a storm, and was subsequently taken (c). The jury reluctantly found a verdict for the defendant; and a rule for a new trial having been obtained,

*Wilson* and *Peckham* showed cause. The convoy from

(a) *S. C.*; but without the arguments of counsel. *Park Ins.* 443, 6th ed.

(b) Whether or not the *Glorieux* had received orders to join *Admiral Graves*, and to form part of the convoy, does not ap-

pear to have been clearly proved at the trial.

(c) Forty-eight other ships were left behind by *Admiral Graves*, all of which lost their insurance.

*Jamaica* was under the orders of *Admiral Graves*, and none but the commander of the convoy could give sailing orders, the receipt of which constitutes a sailing under convoy. The *Glorieux* was indeed intended to form part of the convoy had she arrived in time at *Bluefields*; but not arriving in time, she could not herself form the convoy. The captain of the *Glorieux* had himself no sailing orders, and could not give any to the *Arundel*. The protection afforded to that vessel by the *Glorieux* was merely that which is constantly given by every man-of-war which meets a merchantman. It might have been otherwise if *Admiral Graves* had left ships behind him at *Bluefields* with orders to follow with such ships as might afterwards arrive. There was no necessity which could operate so as to excuse the sailing without convoy. It arose from the negligence of the captain of the *Arundel* in not reaching *Bluefields* before the twenty-sixth. There is no case in which it has been held that a departure without sailing orders is a sailing with convoy, except one, and there the captain was prevented by tempestuous weather from sending his boat for the orders; and the jury found, that as the captain had done every thing in his power, it was a departing with convoy. *Victorin v. Cleeve* (d).

*Lee, S. G., Couper, and Pigott, contra.*—The terms of the contract are, that the vessel shall sail with convoy for the voyage from *Jamaica*. There was no stipulation as to time in the warranty, and therefore the vessel might sail when she pleased, and under any convoy. There was a sailing under the convoy of *Admiral Graves*; but if not, there was a sailing under the sufficient convoy of the *Glorieux*. It is competent to the commander of a convoy to appoint the place of rendezvous; and here it appears that *Admiral Graves* meant to wait in some place until the ships which he had left behind, viz. five out of the ten forming the convoy, should join him. The *Arundel*, having, in fact, joined *Admiral Graves* at *Cape Antonio*, which must be taken to have been the place of rendezvous, sailed under his convoy. Suppose that the admiral had sent off first two of his ships, and then two more, to convoy such of the merchantmen as were ready, with directions to wait for the

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(d) *B. R., H. 19 Geo. 3, 2 Str. 1250. See 1 B. & P. 6; 2 B. & P. 172.*

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rest off *Cape Antonio*—would all the ships which sailed with fewer than the whole convoy appointed sail without convoy? Ships from the north of *Jamaica* never join the convoy till a day or two's sail beyond *Bluefields*; and yet they are held to sail with convoy from *Jamaica* (e). But supposing the facts not to show a sailing under the convoy of *Admiral Graves*, yet the sailing under the convoy of the *Glorieux* was sufficient. On the arrival of the *Arundel* at *Bluefields* there was no other convoy than that of the *Glorieux*; and if the captain had waited for the appointment of another convoy, would he not have been culpable? The *Glorieux* acted in every respect as a convoy, except in not giving sailing orders; and the case of *Victorin v. Cleeve* shows that sailing orders are not in every case necessary. The captain of the *Arundel* did all that was required of him. He applied for sailing orders, and was told that he should have them in case they did not overtake the fleet. It has been said in many cases, that if the one party means to give sailing orders, and the other to take them, it is sufficient, though the orders be not actually received. *Captain Cadogan* was bound to protect the *Arundel*, and would have been punishable if he had omitted to do so.

LORD MANSFIELD.—Although both the underwriter and the insured are equally innocent, one cannot help feeling an inclination, and my leaning has been and is in favour of the insured. But it is impossible to doubt when the facts are rightly understood. An hypothetical contract differs from a conditional contract. The latter admits of argument, and latitude of construction; it may be performed *cy pres*, and according to equity: but the former depending upon a certain event taking place, the only question is, has that event happened, or has it not? It may be a subject of regret, if, by the act of a third person, the event has never occurred; but the Court can afford no relief. The event in this case is, the ship departing with convoy from *Jamaica* to *London*. The usage of trade is this: Government appoints a convoy, and the place of rendezvous. According to this usage, the rendezvous being at *Bluefields*, a ship sailing from *Jamaica* begins her voyage under convoy at *Bluefields*. If *Lord Rodney* had said nothing to the cap-

(e) See *Audley v. Duff*, C. P. C. 62; *Park Ins.* 448, 6th B., H. 40 G. 3, 2 B. & P. 115; edit. *Warwick v. Scott*, 4 Campb. N.

tain of the *Glorieux* about protecting such ships as he might meet with, he would nevertheless have taken under his protection any *English* ship he happened to meet. But this would not have been a convoy. The convoy is that force under which government has put the trade, and a ship cannot choose her own convoy. The trade trusts to government. The admiral of the convoy knows how to act: he has particular orders, and the merchant-ships must act according to his orders. The case here is, that *Lord Rodney* appoints *Admiral Graves* to go to *Bluefields* and take under his command ten ships of the line, which are to meet him there, with which he is to proceed with the convoy to *Great Britain*. When the ships join they receive sailing orders, which are very material, for they appoint signals, &c.; so that sailing orders, as to the business of the fleet, are of the essence of a convoy. On the twenty-sixth of *July*, *Admiral Graves*, for what reason does not appear, sails for *England*. He does not leave orders for a single ship. He gives no directions for any vessel to follow him. He does not say a word about *Cape St. Antonio*: if he had, it might have made a great alteration. The *Arundel* arrived at the place of rendezvous two days after the convoy sailed. She sailed from *Bluefields* in company with the *Glorieux*; but the latter vessel had no orders, and was not a convoy. They came up with the fleet by accident off *Cape St. Antonio*. Under these circumstances it appears to me that there was no equity on either side, and that the jury have done right.

WILLES, *Justice*.—As the case is of consequence, I shall make no apology for differing in opinion with Lord MANSFIELD. I admit that the warranty must be complied with; but my doubt arises upon the state of the facts. The warranty here was general to depart with convoy. No particular time was mentioned, and no particular convoy was in contemplation; it was sufficient therefore to sail under any convoy. I think that, substantially, the terms of the contract have been complied with (*f*). There was no fraud, nor any laches on the part of the captain of the *Arundel*. He did all he could. He put himself under the protection

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(*f*) So it is said by HEATH, J., that "it has always been understood that provisions for departure with convoy have relation to the custom of trade and the orders of government, and ought, therefore, to receive a liberal construction." *Audley v. Duff*, C. B., H. 40 G. 3, 2 B. & P. 115.



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of the *Glorieux*, which was part of the convoy; and it is not said that she was an insufficient convoy. The *Arundel* was under the protection of that vessel from the time she met with her, and she was not lost until after they had both joined the grand convoy. The case of *Victorin v. Cleeve* is the only one I have met with on the subject, and there sailing orders were dispensed with because the captain had done every thing in his power to obtain them. The captain of the *Arundel* did the same. I think the verdict unjust.

BULLER, *Justice (g)*.—We are not called upon at present to say whether sailing orders are essential in all cases. I am inclined to think that they are not in all cases, though always to be wished. Laying that out of the case, the question here is, did the *Arundel* sail with convoy? A warranty like this is a condition which must be strictly and literally complied with. It is immaterial whether the captain of the *Arundel* did all he could to procure a convoy or not; the warranty must still be complied with. Whether it was complied with or not is a question of fact, and the facts show that the ship departed without convoy. Only one convoy was appointed by government, and that convoy was under the orders of *Admiral Graves*. It must be shown that the *Arundel* sailed under *Admiral Graves*, or she did not sail with convoy. It is not an immaterial part of the case, that the admiral did not leave any orders behind him. But it is said that the *Glorieux* was part of the convoy: I say that she was not part of the convoy under the orders of *Admiral Graves*. It is true that it is immaterial what force the convoy consists of, but it must be such as the government appoints. Did the *Arundel* sail under the convoy appointed by government? I think that she did not, and that the rule ought to be discharged.

Rule discharged.

Another action was brought upon the same policy against another of the underwriters, when the jury found a verdict for the plaintiff. "Although a verdict in that case was found for the plaintiff," says Mr. *Justice PARK*, "yet it seems to me to leave the doctrines above advanced unshaken; for upon the second trial it was proved, beyond all doubt, that the *Glorieux* was in truth a part of the convoy, a fact

(g) Mr. *Justice ASHURST* of the Lords Commissioners of was absent, being appointed one of the Great Seal.

which was left doubtful at the trial; and it was upon that fact that Lord MANSFIELD and Mr. Justice BULLER chiefly relied."—*Park Ins.* 446 (n), 6th ed. (h).

(h) The question as to the necessity of a ship obtaining sailing orders arose in two cases on the loss of the same vessel, the *Golden Grove*. In the first case the rule was thus laid down by Mr. Justice BULLER: "In point of law, the general proposition is, that sailing instructions are necessary. I have never decided this point myself, but it has often been determined at *Guildhall*. In *Hibbert v. Pigou*, my expression is, 'It is not necessary to say whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary.' And the case of *Victorin v. Cleeve* goes no further. If the captain from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy; but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with; the captain cannot answer signals; he does

not know the place of rendezvous in case of a storm; he does not, in effect, put himself under the protection of the convoy, and therefore the underwriters are not benefited." *Webb v. Thompson*, C. B., E. 37 G. 3, 1 B. & P. 6. The same doctrine was also laid down by Lord ELDON, C. J., in the other case arising out of the loss of the *Golden Grove*. *Anderson v. Pitcher*, C. B., E. 40 G. 3, 2 B. & P. 164; 3 *Esp. N. P. C.* 124, S. C. But where the ship applies for sailing orders, which are refused by the commander of the convoy, it must be presumed that they are refused for the benefit of trade, protected by the convoy, and they will not be essential to constitute a sailing under convoy. *Veeton v. Wilmot*, 1744, cor. LEE, C. J., *Park Ins.* 444 (n), 6th ed.; 2 B. & P. 170, 171. See also *France v. Kirwan*, 38 G. 3, coram Lord KENYON, Id. 447; *Emerigon*, vol. i. p. 171; *Valin*, vol. i. p. 691; *Abbott on Shipping*, 229, 6th ed. The convoy act, 13 G. 3, c. 57, expired with the war.

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MARTIN v. WINDER.

(Reported, ante, vol. i. p. 199 n.)

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THE KING v. THE JUSTICES OF HUNTINGDONSHIRE.

(Reported, Caldecott, 283.)

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Thursday,  
22d May.

In an ejectment under the 4 Geo. 2, c. 28, on a right of re-entry for non-payment of rent, the taking an insufficient distress after the forfeiture for rent accruing before is not a waiver of the right to re-enter.

BREWER, on the demise of LORD ONSLOW, v. EATON (a).

**LORD ONSLOW** demised to the defendant, for twenty-one years, at a rent payable at *Lady-day* and *Michaelmas*. The lease contained a clause of re-entry if the rent should be in arrear twenty-one days. On the second of *December*, *Lord Onslow* distrained for the sum of £200, being two years' rent due at *Michaelmas*, 1782, but took goods only to the amount of £20. The goods were replevied, and the replevin suit was still depending. In *January*, 1783, *Lord Onslow* brought ejectment on the forfeiture, laying the demise in *October*, previous to the distress. At the trial of the ejectment, before *ASHURST, J.*, it was objected, that *Lord Onslow*, by distraining, had waived the forfeiture, and that he was not therefore entitled to recover. The learned Judge refused to nonsuit the plaintiff, but gave leave to the defendant (the jury having found a verdict for the plaintiff) to move for a new trial. *Morgan* having obtained a rule to show cause,

*Erskine* now showed cause.—This is a proceeding under the statute 4 Geo. 2, c. 28. Had it been a proceeding at common law, it must be admitted that the distress would have been a waiver of the forfeiture; but it is otherwise under the statute, which is meant to operate unless the whole rent has been paid.

*Morgan, contra.*—The statute gives no right of entry where none existed before: its only operation is to facilitate the proceeding. Before this statute, great difficulties existed as to the making an actual entry. *Lib. Ass.* 14 *Ed.* 3, *pl.* 10, *Co. Litt.* 201, 3 *Bl. Com.* 206. To obviate these, the statute was passed. The distress was a waiver of the right of re-entry; and at the time of the ejectment brought, the landlord had no right of entry.

**LORD MANSFIELD.**—The statute speaks of a landlord "who hath by law a right to re-enter," which means a right to re-enter reserved to him in the lease. At common law, the distress operated as a waiver of the forfeiture which incurred on the non-payment; but here the distress affords no presumption that the landlord has waived the forfeiture, be-

(a) *S. C.* cited 6 *T. R.* 220.

cause, as the statute requires him to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrears due, he has distrained in order to complete the title given him by the statute.

WILLES, *Justice*.—The lessor of the plaintiff had two remedies; one by distress, the other by re-entry. At common law, the distress waived the re-entry; but the statute restores that remedy where by common law it was taken away.

BULLER, *Justice*.—I am of the same opinion.

Rule discharged (b).

(b) In *Cheney v. Batten*, B. R., H. 15 G. 3, Cowp. 246, ASTON, J., says, "Where an ejectment has been brought on the stat. 4 G. 2, c. 28, s. 2, for the forfeiture of a lease, there being half a year's rent in arrear, and no sufficient distress on the premises, there acceptance of rent by the landlord has, I believe, been held a waiver of the forfeiture of the lease." So an action of covenant for rent accruing subsequent to the time of the demise laid in the declaration has been held to be a waiver of the forfeiture. *Roe*, dem. *Crompton*, v. *Minshal*, B. R., E. 33 G. 2, Buller N. P. 96; 2 Selw. N. P., 677, 4th ed. S. C. Where a lease contained a proviso for re-entry in case the rent should be twenty-one days in arrear, and there should be no sufficient distress on the premises, and within the twenty-one days the landlord distrained, and continued in possession until after the expiration of the twenty-one days, when he brought ejectment for the forfeiture, Lord ELLENBOROUGH ruled that this was no waiver. His Lordship said, "The only question is, whether by the act of distraining and continuing in possession the forfeiture was waived. A right which had accrued at the time of the distress

might have been waived by it, but the party is not estopped as to any right which accrued subsequently." *Doe*, dem. *Taylor*, v. *Johnson*, 1 Stark. N. P. C. 411.

The principal case is cited in *Goodright*, dem. *Charter*, v. *Cordwent*, B. R., E. 35 G. 3, 6 T. R. 220, for a dictum of Lord MANSFIELD, which is given in the following words: "It is like the receipt of rent after the demise, about which there has been so long a puzzle. This is now finally settled to be no objection. It is receiving what the landlord might recover in an action for the mesne profits." To this doctrine, Lord KENYON, in the case cited, refused to subscribe. In the notes of Mr. Justice LAWRENCE, the passage is thus given: "Settled now that receipt of rent [due] after demise, which used to be the same puzzle, is no bar, but that it depends whether there was an agreement." The word [due] appears to have been inserted by the reporter afterwards. In the note-book of Mr. Justice LE BLANC, the sentence is this: "Like case of a man's receiving rent till of late years, but now finally settled that that depends whether there was any agreement to waive the ejectment." From these reports it

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appears that Lord MANSFIELD "that the question is *quo animo* the rent was received, and doctrine laid down by him in what the real intention of both parties was." *Doe, dem. Chreny, v. Batten, B. R., H. 15 G. 3, Cowp. 245,*

Thursday,  
22d May.

GREGSON v. GILBERT (a).

Where the captain of a slave-ship mistook *Hispaniola* for *Jamaica*, where, by the voyage being retarded, and the water falling short, several of the slaves died for want of water, and others were thrown overboard, it was held that these facts did not support a statement in the declaration, that by the perils of the seas, and contrary winds and currents, the ship was retarded in her voyage, and by reason thereof so much of the water on board was spent, that some of the negroes died for want of sustenance, and others were thrown overboard for the preservation of the rest.

THIS was an action on a policy of insurance, to recover the value of certain slaves thrown overboard for want of water. The declaration stated, that by the perils of the seas, and contrary currents and other misfortunes, the ship was rendered foul and leaky, and was retarded in her voyage; and, by reason thereof, so much of the water on board the said ship, for her said voyage, was spent on board the said ship: that before her arrival at *Jamaica*, to wit, on, &c. a sufficient quantity of water did not remain on board the said ship for preserving the lives of the master and mariners belonging to the said ship, and of the negro slaves on board, for the residue of the said voyage; by reason whereof, during the said voyage, and before the arrival of the said ship at *Jamaica*—to wit, on, &c. and on divers days between that day and the arrival of the said ship at *Jamaica*—sixty negroes died for want of water for sustenance; and forty others, for want of water for sustenance, and through thirst and frenzy thereby occasioned, threw themselves into the sea and were drowned; and the master and mariners, for the preservation of their own lives, and the lives of the rest of the negroes, which for want of water they could not otherwise preserve, were obliged to throw overboard 150 other negroes. The facts, at the trial, appeared to be, that the ship on board of which the negroes who were the subject of this policy were, on her voyage from the coast of *Guinea* to *Jamaica*, by mistake got to leeward of that island, by mistaking it for *Hispaniola*, which induced the captain to bear away to leeward of it, and brought the vessel to one day's water before the mistake was discovered, when they were a month's voyage from the island, against winds and currents, in consequence of which the negroes were thrown

(a) S. C., but without the arguments of counsel. *Park Ins.* 82, 6th ed.

overboard. A verdict having been found for the plaintiff, a rule for a new trial was obtained on the grounds that a sufficient necessity did not exist for throwing the negroes overboard, and also that the loss was not within the terms of the policy.

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*Davenport, Pigott, and Heywood*, in support of the rule. —There appeared in evidence no sufficient necessity to justify the captain and crew in throwing the negroes overboard. The last necessity only could authorize such a measure; and it appears, that at the time when the first slaves were thrown overboard, there were three butts of good water, and two and a half of sour water, on board. At this time, therefore, there was only an apprehended necessity, which was not sufficient. Soon afterwards the rains came on, which furnished water for eleven days, notwithstanding which more of the negroes were thrown overboard. At all events the loss arose not from the perils of the seas, but from the negligence or ignorance of the captain, for which the owners, and not the insurers, are liable. The ship sailed from *Africa* without sufficient water, for the casks were found to be less than was supposed. She passed *Tobago* without touching, though she might have made that and other islands. The declaration states, that by perils of the seas, and contrary currents and other misfortunes, the ship was rendered foul and leaky, and was retarded in her voyage; but no evidence was given that the perils of the seas reduced them to this necessity. The truth was, that finding they should have a bad market for their slaves, they took these means of transferring the loss from the owners to the underwriters. Many instances have occurred of slaves dying for want of provisions, but no attempt was ever made to bring such a loss within the policy. There is no instance in which the mortality of slaves falls upon the underwriters, except in the cases of perils of the seas and of enemies.

*Lee, S. G., and Chambre, contra.*—It has been decided, whether wisely or unwisely is not now the question, that a portion of our fellow-creatures may become the subject of property. This, therefore, was a throwing overboard of goods, and of part to save the residue. The question is, first, whether any necessity existed for that act. The voyage was eighteen weeks instead of six, and that in consequence of contrary winds and calms. It was impossible to regain the island of *Jamaica* in less than three weeks; but it is said that

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other islands might have been reached. This is said from the maps, and is contradicted by the evidence. It is also said that a supply of water might have been obtained at *Tobago*; but at that place there was sufficient for the voyage to *Jamaica* if the subsequent mistake had not occurred. With regard to that mistake, it appeared that the currents were stronger than usual. The apprehension of necessity under which the first negroes were thrown overboard was justified by the result. The crew themselves suffered so severely, that seven out of seventeen died after their arrival at *Jamaica*. There was no evidence, as stated on the other side, of any negroes being thrown overboard after the rains. Nor was it the fact that the slaves were destroyed in order to throw the loss on the underwriters. Forty or fifty of the negroes were suffered to die, and thirty were lying dead when the vessel arrived at *Jamaica*. But another ground has been taken, and it is said that this is not a loss within the policy. It is stated in the declaration that the ship was retarded by perils of the seas, and contrary winds and currents, and other misfortunes, &c. whereby the negroes died for want of sustenance, &c. Every particular circumstance of this averment need not be proved. In an indictment for murder it is not necessary to prove each particular circumstance. Here it sufficiently appears that the loss was primarily caused by the perils of the seas.

Lord MANSFIELD.—This is a very uncommon case, and deserves a reconsideration. There is great weight in the objection, that the evidence does not support the statement of the loss made in the declaration. There is no evidence of the ship being foul and leaky, and that certainly was not the cause of the delay. There is weight, also, in the circumstance of the throwing overboard of the negroes after the rain (if the fact be so), for which, upon the evidence, there appears to have been no necessity. There should, on the ground of reconsideration only, be a new trial, on the payment of costs.

WILLES, *Justice*, of the same opinion.

BULLER, *Justice*.—The cause of the delay, as proved, is not the same as that stated in the declaration. The argument drawn from the law respecting indictments for murder does not apply. There the substance of the indictment is proved, though the instrument with which the crime was effected be different from that laid. It would be dangerous

to suffer the plaintiff to recover on a peril not stated in the declaration, because it would not appear on the record not to have been within the policy, and the defendant would have no remedy. Suppose the law clear, that a loss happening by the negligence of the captain does not discharge the underwriters, yet upon this declaration the defendant could not raise that point.

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v.  
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Rule absolute on payment of costs (b).

(b) It was probably this case which led to the passing of the statutes 30 G. 3, c. 33, s. 8, and 34 G. 3, c. 80, s. 10, prohibiting the insurance of slaves against any loss or damage except the perils of the seas, piracy, insurrection, capture, barratry, and destruction by fire; and providing that no loss or damage shall be recoverable on account of the mortality of slaves by

natural death or ill-treatment, or against loss by throwing overboard on any account whatsoever. See *Tatham v. Hodgson*, B. R., E. 36 G. 3, 6 T. R. 656. As to insurance upon animals which have been killed by the perils of the seas, see *Lawrence v. Aberdeen*, B. R., M. 2 G. 4, 5 B. & A. 107; *Gabay v. Lloyd*, B. R., H. 5 & 6 G. 4, 3 B & C. 793.

THE KING v. THE INHABITANTS OF TOTTINGTON LOWER  
END.

Saturday,  
24th May.

(Reported, *Caldecott*, 284.)

PALMER v. EDWARDS.

Saturday,  
24th May.

(Reported, *ante*, vol. i. p. 187 n.)

GOODWIN v. MONTAGUE (a).

Monday,  
26th May.

**MORGAN** moved, on *Saturday*, to set aside an attachment against the sheriff for irregularity. The sheriff had been ruled to return the writ, and had the whole of the 12th of *May* to return it; and if he had not returned it till night he could not have been ruled to bring in the body till the

The sheriff having returned the writ, may be ruled on the same day to bring in the body; and if he disobeys, may be

attached; but the Court will, at the instance of the defendant, set aside the attachment on payment of costs, in case there are merits.

(a) S. C. cited 1 *Tidd's Pr.* 312. 316, 8th ed.



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13th, and, of course, could not have been attached till the 17th: but the sheriff having returned the writ early on the 12th, was ruled that day to bring in the body; and not having obeyed the latter rule, an attachment went. *Morgan* contended, that the rule to bring in the body could not regularly issue till the 13th, for the sheriff ought not to have returned the writ till the last moment: but the Court said he might and ought to return it as soon as possible, and refused the motion (b).

*Morgan* now moved to set aside the attachment on payment of costs and on a suggestion of merits (c).

*Wood, contra*, said, that the only merits were infancy; but *Morgan* undertaking not to set up that defence, the Court  
Granted the rule (c).

(b) Accord. *Parker v. Wall*, an affidavit of merits. *R. M.* 59 *B. R.*, *M.* 26 *G.* 3, 1 *Tidd's* *G.* 3, 2 *B. & A.* 240; 1 *Tidd's* *Pr.* 312, 8th ed. *Pr.* 316, 8th ed.

(c) The Court now requires

Monday,  
26th May.

Rule for a mandamus to admit the prosecutor to the freedom of a corporation, absolute in the first instance.

#### THE KING v. THE MAYOR, &c. OF COVENTRY.

IN the beginning of this term *Douglas* moved for a rule to show cause why a *mandamus* should not go to admit the prosecutor to the freedom of the corporation of *Coventry*. The officer, conceiving it to be the usual course, drew it up as absolute in the first instance, and the writ accordingly issued. Some days afterwards *Lane* moved to enlarge the rule (supposing it to be a rule *Nisi*) till a day near the end of the term, which was granted. But to-day *Lane* mentioned that the mandamus had issued, and desired the Court to let the matter come on as a rule to show cause. *Douglas* made no objection, but the Court (*WILLES* and *BULLER, J. J.*), after talking with the officers, said, that the course was for the writ to go in the first instance, and refused *Lane's* application (a).

(a) "Where it is to swear or to admit, the Court will, in case the right appear plain, grant the writ upon the first motion. But where it is to restore one who has been removed, they would first grant a rule to show cause why such a writ should not issue." *Buller N. P.* 199; see *R. v. Mayor of Truro, M.* 1816, 2 *Chitty*, 257, and *Ilchester's* case there cited.

THE KING v. THE INHABITANTS OF IVESTON.

(Reported, Caldecott, 288.)

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Wednesday,  
28th May.

THE KING v. PICKERSGILL.

(Reported, Caldecott, 291.)

Wednesday,  
28th May.

THE KING v. HÖRNER.

(Reported, Caldecott, 295.)

Friday,  
30th May.

THE KING v. SIMMONS.

Friday,  
30th May.

A RULE was obtained to show cause why the defendant should not take upon himself the office of mayor of *Falmouth*. The motion was made upon an affidavit stating, simply, that the defendant had been elected mayor, and had refused.

The Court will grant a rule for a mandamus to serve the office of mayor, upon an affidavit merely stating the election and refusal.

*Bearcroft* showed cause, and contended that it was usually stated in such affidavits that the mayor was a justice of the peace, and that unless some such ground were laid, the Court would not interfere as to the service of the office of mayor, which in itself was a mere private matter. He insisted, also, that the application was too late, half a year having expired, and two terms having elapsed; but if the Court thought the motion well grounded, the defendant had an answer to it, which was, that there was a by-law imposing a penalty of £12 for non-service, which the defendant was ready to pay.

*Hill, Serj., contra.*—The mandamus gives a specific relief; and there are cases in which the Court has granted mandamuses to serve the office of mayor, without stating any other ground than is made here. As to the by-law, every man in the borough might make the same choice, of paying the penalty rather than serve.

*Per Cur.* They have been six months without a mayor, but that is no reason why they should be other six months.

Rule absolute.

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—  
 Saturday,  
 31st May.

THE KING v. THE INHABITANTS OF WINTERSETT.

(Reported, Caldecott, 298.)

Saturday,  
 31st May.

THE KING v. STEVENS.

(Reported, Caldecott, 302.)

Monday,  
 2d June.

An *essoins* does  
 not lie for a cor-  
 poration, nor in  
 a personal  
 action.

ARGENT v. THE DEAN AND CHAPTER OF ST. PAUL'S (a).

**T**HIS was an action for a false return to a mandamus under the seal of the corporation. The corporation having ~~sent an *essoins*~~, a rule had been obtained to show cause why that *essoins* should not be quashed.

*Law* showed cause.—An action lies against any of the members of a corporation, by their private names, for a false return to a mandamus. *The King v. the Corporation of Ripon* (b); *Rich v. Pilkington* (c). But it is said that this is a personal action, and that therefore an *essoins* does not lie; and the case of *Simons v. the mayor of Totness* (d) will be relied upon. Anciently *essoins* were allowed in personal actions; 2 *Inst.* 125; and it is said by *Booth*, in his *Treatise on Real Actions* (e), that it lies for the plaintiff and defendant in personal actions. There are other authorities to the same effect; *Freshwater v. Reus* (f), *Barclay v. Easte* (g). In *Anson v. Jefferson* (h), PRATT, C. J., said, "I cannot say that *essoins* may not be allowed in personal actions."

LORD MANSFIELD.—There are two reasons against you: 1. That no *essoins* lies for a corporation; and, 2. You rely on Lord COKE, whose opinion is evidently against you. So, in *Anson v. Jefferson*, PRATT, C. J., says, that it is an obsolete practice, and a great abuse of the law.

BULLER, *Justice*.—Since the time of Lord COKE, but at

(a) S. C. cited 2 T. R. 16.

(e) Chap. 5, p. 14.

(b) B. R., T. 12 W. 3, Com. 86.

(f) B. R., M. 2 Jac. 1.,

1 Brownl. 193.

(c) B. R., H. 2 &amp; 3 W. 3, Carth. 171.

(g) B. R., T. 16 G. 2, 2 Str. 1194.

(d) C. B., H. 12 G. 2, Cook's Cases in C. B.

(h) C. B., E. 3 G. 3, 2 Wils. 164.

what precise period does not appear, the Court have gone back to what ought to have been the practice. It certainly was prior to the 11 *Geo. 2*, when a case occurred in which this point was decided. The better opinion is, that it could not be since the statute of *Marlbridge*.

Rule absolute (i).

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(i) See *Rooke v. Earl of Leicester*, *B. R.*, *T.* 27 *G. 3*, 2 *T. R.* 16.

COCKSON v. DRINKWATER (a).

Wednesday,  
25th June.

**ASSUMPSIT** against an executor on promises by the testator and himself. Pleas *non assumpsit* and *plene administravit*; the first of which was found for the plaintiff, and the latter for the defendant.

Where an executor pleads the general issue and *plene administravit*, and the former plea is found against him, and the latter for him, he is entitled to the *postea*.

*Bower* moved for a rule to show cause why the *postea* should not be delivered to the defendant. He cited *Hollingshead v. Mayo* (b), and *Nethel v. Garnon* (c).

*BULLER, Justice*, added the case of *Winhall v. Rushbury* (d), and said, that there were other cases on the same subject, and that the point was completely settled.

Rule absolute in the first instance (e).

(a) *S. C.* cited *Tidd's Pr.* 1016, 8th ed.

(d) *M.* 19 *G. 3*.

(b) *M.* 16 *G. 3*.

(e) See *Edwards v. Bethel*, *B. R.*, *H.* 58 *G. 3*, 1 *B. & A.*

(c) Probably *Garnons v. Hesketh*, *B. R.*, *E.* 22 *G. 3*, 2 *Tidd*, 1016, 8th ed.

254; *Ragg v. Wells*, *C. B.*, *M.* 58 *G. 3*, 8 *Taunt.* 129; *Tidd's Pr.* 1016, 8th ed.

**C A S E S**  
**ARGUED AND DETERMINED**  
 IN THE  
**COURT OF KING'S BENCH,**  
 IN  
**TRINITY TERM,**  
 IN THE  
**TWENTY-THIRD YEAR OF THE REIGN OF GEORGE III.\***

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Wednesday,  
25th June.

**THE KING v. THE INHABITANTS OF UPTON GRAY.**  
*(Reported, Caldecott, 308.)*

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Wednesday,  
25th June.

**THE KING v. EDWARD PRYSE LLOYD, Esq.**  
*(Reported, Caldecott, 309.)*

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Wednesday,  
25th June.

**WRIGHT and Another v. LORD VERNEY.**

*Seemle* that a bond to a sheriff, the condition of which recites that the sheriff, by virtue of a *fi-fu*, had seized and taken in execution, of the goods and chattels of *R. V.*, divers goods and chattels, and that the sheriff, at the request of the obligor, had quitted possession, and agreed to return *nulla bona*, and then for indemnifying the sheriff for so doing, is illegal.

**D**EBT on bond. The defendant prayed *oyer* of the bond and condition. The bond was from the defendant and two others to the plaintiffs, sheriff of *Middlesex*, for £3000. The condition recited that the plaintiffs, sheriff of *Middlesex*, by virtue of a *fi-fu*, at the suit of *W. Burke* and *C. Hargrave*, had seized and taken in execution of the goods and chattels of the said *Sir Ralph Verney*, in the bailiwick

\* During this term Mr. Justice ASHURST was absent in the Court of Chancery.

of the said sheriff, divers goods and chattels to the amount in value of the money so directed to be levied by virtue of the said writ. That the said sheriff, at the request of the said defendant, had quitted possession, and agreed to return to the said writ, that the defendant had no goods and chattels in his bailiwick. The condition was to indemnify the sheriff for all costs, charges, &c. by reason of quitting the possession or returning the writ, in manner above mentioned. The defendant then pleaded that the plaintiffs were not damnified by quitting possession, or returning the writ as aforesaid. Replication, That the plaintiffs, in pursuance of the said agreement, did return upon the said writ, that the said Sir *Ralph Verney* had no goods and chattels, &c., by reason whereof they were obliged to pay, and did pay, to the said *W. B.* and *C. H.* (the plaintiffs in the original action) the sum of £1484. Rejoinder, That the said plaintiffs were not damnified by reason of their returning the writ in manner in the said condition and replication mentioned; on which issue was joined. A rule having been obtained to show cause why the judgment should not be arrested, on the ground that the condition was illegal,

*Davenport* showed cause, and contended that it was usual and convenient to indemnify the sheriff in cases where the property in the goods is disputed, as where there is a settlement. [BULLER, J.—The condition recites “that the sheriff had levied of the goods of *Lord Verney*,” therefore this is not a case of disputed property.] Indemnity bonds do not usually recite the particular circumstances.

*Morgan*, *contra*, said, that the defendant did not mean, if the Court should determine in his favour, to take advantage of the decision, in order to make the sheriff lose the money. He only wanted time, having made over his estate to trustees for payment of his debts.

The Court seemed to be clearly of opinion that the bond was illegal, but in consequence of what was said by *Morgan*, they only enlarged the rule for a twelvemonth.

Rule enlarged (a).

(a) The usual form of this bond is, “Whereas the said sheriff, by virtue, &c. &c. hath seised and taken divers goods and chattels as the proper goods and chattels of the said *C. D.* in execution. And whereas the

above-bounden *J. K.* hath given notice to the said sheriff, and claimed the said goods and chattels, and hath requested the said sheriff to quit possession,” &c. &c. *Watson on Sheriffs*, 380.

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Saturday,  
28th June.

THE KING v. GEORGE PARKER (a).

On a prosecution for perjury, where, on the part of the prosecution, the depositions of a deceased person were offered in evidence, and upon the cross-examination of the prosecutor's witness, certain declarations of the deceased witness, not upon oath, were proved for the purpose of corroborating the facts stated in his depositions, in a matter material to the defendant, it was held that evidence of such declarations was not admissible.

After a conviction for perjury it is no ground for a new trial that the jury hesitated in giving their verdict; nor will the Court receive affidavits of the jurymen stating that they did not intend to find a verdict of guilty.

**THIS** was an indictment for perjury, removed into this court, and tried at the last *Huntingdon* Assizes, before EYRE, B. The facts were as follows.

In *February*, 1781, the mail was robbed between *Huntingdon* and *Wisbeach*, and a bank note contained in it was soon afterwards found in the possession of one *Fowler*, who said he received it at *Lynn*, on the 20th of *March*, from two persons whom he did not know. Suspicion attaching to two persons of the names of *Rys Masingarb* and *Bryan Hall*, both of *Wisbeach*, *Fowler* was sent to look at them, and swore that they were the persons from whom he received the note. The defendant, who lived at *Wisbeach*, also made oath, before two justices of the peace, that he saw *Masingarb* and *Hall* in the street at *Lynn*, on the said 20th of *March*. *Masingarb* and *Hall* were, upon these informations, committed to prison, but were soon afterwards discharged. *Fowler* was tried for the robbery at the *Huntingdon* Summer Assizes, 1782, and acquitted, and died soon afterwards. On the trial of the present indictment *Fowler's* information, on oath, was read by the prosecutor to prove the introductory part of the indictment. It also came out, on the cross-examination of one *Rayner*, a witness for the prosecution, that *Fowler* had been sent to him at *Wisbeach* to see if he could recognise the persons from whom he had received the note: that he had carried him out into the street, where, on seeing *Masingarb*, he immediately said, "That is the man;" and that he afterwards recognised *Hall* in the same manner. Mr. *Baron EYRE*, after this evidence had been given, struck his pen through it, and left it out of his summing up to the jury. *Hall* was at *Lynn* on the 20th of *March*, but it was proved, by a number of witnesses, that *Masingarb* was not.

The jury brought in a verdict "Guilty, but not wilfully;" and being sent out again by the judge, returned, in a few

(a) This appears to be the Case. See 1 *Phill. Ev.* 292 (n).  
case alluded to by Lord REDESDALE in the *Berkeley Peerage* 6th ed.

minutes, with a verdict of "Guilty." A new trial having been moved for last term,

*Graham* and *G. Wilson*, for the defendant, contended that the evidence of *Rayner* ought to have been left to the jury; 1. Because it was not mere hearsay, but consisted partly of what *Fowler* did, of which what he said was only explanatory; and they cited, on this point, *Lake v. Lake* (b), and *Thompson v. Trevannion* (c), where hearsay, under particular circumstances, had been admitted; 2. Because what *Fowler* said was evidence to confirm what he said in his information on oath, which, having been read, was material on the part of the defendant to show that *Masingarb*, or at least some person very like him, was at *Lynn* on the day in question. To show that the declarations of a witness are evidence to corroborate what he says on oath, they cited *Luttrell v. Reynell* (d), *Gilbert's Evid. c. 150*, *Buller's N. P. 294*, 2 *Hawk. P. C. 431*. They also argued that there was not sufficient evidence of an intention to swear falsely, and that the doubt of the jury was in such case a ground for a new trial; and they offered to produce affidavits of two jurymen, that they did not mean to find the defendant guilty.

The Court (Lord MANSFIELD *absente*) stopped the *Solicitor-General*, who was on the other side. They would not suffer the affidavits to be read (e), and were clear that the hesitation of the jury was not a ground for a new trial. BULLER, J., said, that the same thing had been attempted on a similar verdict against one *Milles*, a quaker, tried before him for a false affirmation, and a new trial refused.

As to the point of evidence, WILLES, J., at first inclined to think it admissible, having come out on the cross-examination of a witness for the prosecution, but he afterwards retracted this opinion.

BULLER, Justice, said, that the evidence was clearly inadmissible, not being upon oath; and that whether *Fowler*

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(b) *Canc. 1751*, 1 *Wils. 313*. *R., M. 11 G. 3*, 5 *Burr. 2667*;  
(c) *B. R., Skinner*, 402; see *Clark v. Stevenson*, *C. B., H.*  
6 *East*, 193. 13 *G. 3*, 2 *W. Bl. 803*; *Jackson v. Williamson*, *B. R., H.*  
(d) *B. R., M. 22 Car. 2*, 1 28 *G. 3*, 2 *T. R. 281*; *Davis v.*  
*Mod. 283*. See also *Harrison's Taylor*, *B. R. 1815*, 2 *Chitty*,  
*case*, 12 *State Tr. 861*; *Friend's 263*; *Milson v. Hayward*, *Scacc.*  
*case*, 13 *State Tr. 32*. *H. 1 & 2 G. 4*, 9 *Price*, 134.  
(e) See *R. v. Woodfall*, *B.*



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expressed himself by words or by signs and gestures, made no difference. As to the other ground, he said that the information of *Fowler* was not read as evidence for the defendant; but if it had, it was now settled, that what a witness said not upon oath would not be admitted to confirm what he said upon oath; and that the case of *Lutterell v. Reynell* and the passage cited from *Hawkins* were not now law (*f*).

The Court, however, on some favourable circumstances in the evidence, although they did not think there was ground for a new trial, recommended it to the *Solicitor-General* to procure the defendant a pardon, which he undertook to do.

(*f*) See 1 *Phill. Ev.* 292, 6th ed.; 1 *Stark. Ev.* 149; 2 *Russell on Crimes*, 635, 2d ed.; Sir *W. D. Evans*, in his *Notes to Pothier on Obligations*, vol. ii. p. 251, has made the following observations on this subject, which appear to deserve great attention. "One of the cases which are mentioned as exceptions to the rule for excluding hearsay evidence, is, where it is adduced to show that the testimony given by a witness upon the trial is consistent with his declarations on former occasions; but it is said that this is not evidence in chief, and it is doubtful whether it be so in reply. 1 *Mod.* 283. According to the principles of correct reasoning, the propriety of the evidence in this case, as in the others already referred to, must depend upon the nature of the object which it is intended to attain. In an ordinary case the evidence would be at least superfluous, for the assertions of a witness are to be regarded in general as true until there is some particular reason for impeaching them as false; which reason may be repelled by circumstances, showing that the motive upon which it is supposed to have been

founded could not have had existence at the time when the previous relation was made, and which therefore repel the supposition of the fact related being an after-thought or falsification. The suspicion of an opposite conduct may result either from the inherent nature and complexion of the evidence itself, or it may be indicated by the imputations actually thrown out in cross-examination or otherwise, by the opposite party. If a witness speaks to facts negating the existence of a contract, and insinuations are thrown out that he has a near connexion with the party on whose behalf he appears, that a change of market, or any other alteration of circumstances, has excited an inducement to recede from a deliberate engagement; the proof, by unsuspicious testimony, that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstance, and the testimony is placed upon the same level which it would have had if the motives for receding from a previous intention had never had existence. Upon accusations for rape, where the forbearing to mention the cir-

cumstance for a considerable time is in itself a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection. See *East*, *P. C. c. 10, s. 5.*"

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THE LONDON ASSURANCE COMPANY v. SAINSBURY and Another.

Saturday.  
28th June.

*MR. LANGDALE*'s houses in *Holborn*, with his stock in trade, having been destroyed in the riots in *June*, 1780, he brought an action against *Kennett* and others, inhabitants of the city of *London*, on the riot act. The cause of *Langdale v. Kennett* was tried at *Guildhall*, before *BULLER, J.*, on the 3d of *March*, 1781, and it appeared in evidence that *Mr. Langdale*'s property had been in part insured, and particularly the *London Assurance* had paid him £1689, 14s. 8d. on account of an insurance on the stock in trade and utensils. *Mr. Justice BULLER* told the jury that they certainly ought not to deduct the amount of the insurances from the value of the houses and goods. The jury, however, brought in a verdict, in writing, as follows:—"We are agreed in giving *Mr. Langdale* a balance of £18,729, 10s. 10d., in which we allow him on the buildings, rent, and stock in trade, in both houses and furniture. We have set off and deducted the amount of the duty remitted, and for the sundry insurances, and we give the balance left." In the following *Easter Term* a new trial was moved for on the part of the plaintiff, but the Court refused the rule, and it was generally understood that the insurers were entitled to bring an action on the statute in their own names.

An insurance office having paid the assured the amount of the loss sustained by him in consequence of a demolishing by rioters, sued the hundredors under the stat. 1 G. 1, st. 2, c. 5, s. 6, in their own names. Held by Lord Mansfield and Buller, J. (Wilkes and Ashurst, JJ., dissentient.), that the office was not entitled to recover.

The present action was brought in the same term (*E. 21, Geo. 3*). The declaration stated the insurance made by *Langdale* with the plaintiffs in 1763, setting forth the policy at length, and that all the conditions were complied with on the part of the insured. It then stated, that after the last day of *July*, 1715, and whilst the said insurance continued in force, viz. on the 7th of *June*, 1780, divers persons, to the number of twelve and more, demolished the said house and goods by fire to the value of £10,000, whereby the plaintiffs became liable and obliged to pay, and did then and there

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pay to the said *T. Langdale* £1689, 14s. 8d., being their proportion of the loss; by reason of which premises the plaintiffs, by such demolishing and destroying by fire, the said goods, &c. were injured and damnified, &c., contrary to the statute, whereof the defendants, being inhabitants of *London*, &c. had notice.

The defendants pleaded, 1. The general issue; 2. That *Thomas Langdale*, after the last day of *July*, 1715, and before the exhibiting of the bill by the plaintiffs, viz. in *Michaelmas Term*, 21 *Geo. 3*, impleaded *B. Kennett*, &c. inhabitants of *London*, on a plea of trespass in the case. [The declaration, plea, and issue, in that suit, were here set forth.] That a verdict was found against the said *B. Kennett*, &c. for £18,720, 0s. 3d.; which said verdict still remains in force. And the said defendants aver, that the said *T. Langdale* mentioned in the present declaration, is the same person, &c., and the houses and goods mentioned in the present declaration are part of the houses and goods, &c. mentioned in the aforesaid declaration of the said *T. Langdale* against *B. Kennett*, &c., and for the same demolition of which, among other things, the said *T. Langdale* obtained the said verdict.

The plaintiffs replied, that before the said *T. Langdale* impleaded the said *B. Kennett*, &c. in the manner set forth, the said *London Assurance* did pay to the said *T. Langdale* the said sum of £1689, 14s. 8d., in the said declaration mentioned; and they further say, that at the trial of the issue in the said plea mentioned, it was given in evidence, on the part of the said *B. Kennett*, &c., that the said *T. Langdale* had received from the *London Assurance* the said £1689, 14s. 8d. on account of his damages sustained, &c.; and it was there insisted, for the said *B. Kennett*, &c., that the jury, in assessing the damages, ought to deduct from the damages sustained by the said *T. Langdale*, &c., the said sum of £1689, 14s. 8d.; and that the jury did deduct from the damages the said sum, and at the time of giving their verdict did declare to the said Court that they had made such deduction. And the said plaintiffs further said, that the damages sustained by the said *T. Langdale* did amount to the sum of £18,720, 0s. 3d., over and above and exclusive of the said sum of £1689, 14s. 8d. so paid by the said plaintiffs.

Demurrer, and joinder in demurrer.

The case came on to be argued in *Hilary Term*.

*Davenport* for the demurrer.—It is admitted that the damage was sustained, and that it is not within any of the exceptions. The Court will not be troubled with any objections which have been overruled in a former case. A corporation cannot sue under the statute 1 Geo. 1 (a), nor will the Court strain a point in its favour. Corporations not named in acts of parliament are not included under the denomination of persons. A corporation cannot be outlawed, excommunicated, or attainted, and cannot do fealty. Can it be said that corporations are within the Court of Conscience act for *London*? 14 Geo. 2, c. 10. The acts of 2 Geo. 2, c. 25, and 7 Geo. 2, c. 22, against forgery, which mention persons, did not extend to corporations; and another act (b) was passed to subject persons to punishment for forgeries in corporations. The question then is, whether the word shall have a different meaning in a civil case and in a criminal one. In the one case persons are damnified, in the other they are defrauded. No objection will be made that the action is brought in the name of the insurer, because that question appears to be decided in *Mason v. Sainsbury* (c). [BULLER, J., said he did not understand that point to be concluded by any thing that had passed in this court; and Lord MANSFIELD said that the great question was, whether the insurer could recover otherwise than in the name of the insured.] Certain persons may recover as trustees by the words of the act, as rectors, &c. for their churches. The only difficulty will be that the Court must say the jury did wrong in *Langdale v. Kennett*, in deducting the sum insured from the damages, and not suffering the plaintiff to recover as trustee for the insurers. If that question is open, the defendant must contend that no persons can recover as trustees but those who are described in the act. The legislature does not appear to have intended to comprehend insurers. If it had been mentioned, the answer would have been, “You may make an exception in your policy.”

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(a) 1 G. 1, st. 2, c. 5, s. 6, which enacts, that if any church or chapel, &c., or any dwelling-house, &c., shall be demolished or pulled down, &c., the inhabitants of the hundred within which such damage shall be done shall be liable to yield damages to the person or persons

injured or damnified by such demolishing, &c.; and see the new statute 7 & 8 G. 4, c. 31, s. 2.

(b) 31 G. 2, c. 22, s. 78; 18 G. 3, c. 18. See *Harrison's case*, 1777; 1 *Leach*, 180; 2 *East*, P. C. c. 19, s. 59, p. 988; 2 *Russell on Crimes*, 369, 2d ed.

(c) *Ante*, p. 61.

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Lord MANSFIELD desired *Baldwin* to take till *Tuesday* to consider the second point, on which he was not prepared. He said, as to the first point, this was a remedial law, and the strictness of construction adopted in some criminal cases, from a mistaken lenity, should not be extended to it. The question to be argued will be whether the insurer can maintain an action in his own name.

On *Tuesday*, the 4th of *February*, the case was accordingly argued by *Baldwin* for the plaintiffs, and *Davenport* for the defendants.

*Baldwin*, for the plaintiffs.—The question directed by the Court to be argued is, whether an insurer, either an individual or a corporation, having paid the loss incurred by a demolition of the property, is entitled to recover under the statute 1 *Geo. 1, st. 2, c. 5*. It is material to consider the general principles applicable to the case. This is a remedial law; *Ratcliffe v. Eden* (*d*), *Hyde v. Cogan* (*e*), *Wilmot v. Horton* (*f*). The purposes of the act are, 1. To punish rioters; 2. To compel the hundred to suppress riots and to make compensation. The recompense is not given by the statute either to the owner or the occupier, or to any other person, by the description of his interest, but generally to the person damnified. The hundred are to pay a certain sum, and it is immaterial to them to whom it is paid. In *Mason v. Sainsbury* (*g*), the plaintiff recovered the whole amount of his loss, though insured as to part. Are not the present plaintiffs damnified? If they do not succeed, the hundred will be relieved from the sum the plaintiffs have paid. The Court will construe the statute liberally; and there are not wanting cases of an equitable interest conferring a right of action. In *Mason v. Sainsbury* it was admitted, that in the case of a ship being run down, the insurer might maintain an action in his own name. Suppose that a person is bound to repair a road, is it not good sense that he should have an action against a person who damages it? So a sheriff may have an action against a gaoler for an escape. But it is weakening the case to adduce examples. It rests on the act of parliament. It is not the case of parties making a wager, but of persons doing an act beneficial to the

(*d*) *B. R., M. 17 G. 3, Cowp.* (*f*) *C. B. cited ante*, vol. ii. 485. (*n*), p. 702.  
(*e*) *B. R., T. 21 G. 3, ante*, (*g*) *Ante*, p. 61.  
vol. ii. p. 699.

public, and sanctioned by the legislature. Mr. *Langdale* was not permitted to recover for this sum; and should it be held that the plaintiffs cannot recover in this action, and should Mr. *Langdale* refuse his name, they would be left without remedy.

*Davenport, contra.*—The question is, whether the act meant to include collateral and subdivided interests—whether every person having an interest to the amount of £20 shall harass the hundred with an action. Only one action is given by the statute; that action has been brought by Mr. *Langdale*, who has recovered in it all he was entitled to recover; and should the plaintiffs attempt to use his name, they would be barred by the recovery in the former action. Suppose that there should be a hundred insurers, shall there be as many actions with costs in each? In *Mason v. Sainsbury*, the whole amount was recovered by the person really interested. In this case they should, if they were dissatisfied with the verdict in *Langdale's* case, have taken the sense of the Court upon it. The sheriff, in the case of an escape, always sues in the name of the original plaintiff. He could not have a special action in his own name. Could the insurer, before the statute, have sued the trespasser? If not, the act makes no difference. *Langdale* properly brought his action for the whole loss, and no person can sue after him.

*Baldwin*, in reply.—If the hundred are injured by a multiplicity of actions, they have only themselves to blame. It appears upon the record that they objected to the recovery of the whole in the name of *Langdale*.

*Cur. adv. vult.*

The Court not being agreed, the Judges now delivered their opinions *seriatim*.

BULLER, *Justice*, (after stating the pleadings).—Such a plea and replication never were put on a record before, and I hope never will again. The result of the plea is, that the jury did not give enough. I am satisfied that they did wrong, and that I did wrong in admitting the evidence as to the insurance; but I directed the jury not to deduct, though they found contrary to that direction. In another cause I gave the same direction, and the jury found accordingly. The matter of a verdict is not traversable, and cannot be questioned in another action. It is not impeached here by any record, but by averment against the record, which can only be tried by matter *in pais*, by evidence of what the

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jury thought. If they said nothing, could you try on what ground they went, or what demand or evidence they did not rely on? When the jury disclose the ground on which they went, in order to enable the party the better to have justice, the case must be the same. This does not resemble the case of confessing and avoiding a judgment, as that the promises are not the same, for there the judgment is admitted; there the question is tried by the proof of the evidence at the former trial, to show that the matter never was before a jury at all; but no proof is given of what the jury thought. Here the suit is not for a different cause of action, but for the burning of *Langdale's* house. If *A.* brings an action for a bale of goods, and recovers for twenty yards, shall he afterwards bring another action, and say, "I sold thirty yards?" He ought to have proved his whole case at first. To a plea of judgment recovered, what could he reply? Not that it is a different cause of action. Here it is admitted that the cause of action is the same; therefore, supposing that the plaintiffs could bring an action in their own names, which I deny, still the judgment in the former action would be a bar. But it does not appear whether there was a judgment. Both the plea and replication are bad, and I shall consider it as a demurrer to the declaration.

The question is, Whether the plaintiffs can maintain an action in their own name? That depends upon another. Have they been injured? The property was in *Langdale*. The plaintiffs could neither take, sell, nor enjoy it. Can the destruction of it give them a property in it? If the insurance be a wager, then no action will lie; and I think that with respect to third persons it is a wager. In *Mason v. Sainsbury* it was held not to be an indemnity to the hundred. The hundred shall be neither benefited nor prejudiced by it. A wager confers no interest, and yet the persons making the wager are affected by the event, and liable to pay. It is said, however, that this is not a wager, because it is a laudable act; but at common law a wager is as lawful as an insurance. I therefore hold that a wager between *A.* and *B.* will not give the wageror an action against a third person.

But suppose it to be an indemnity. The insurer, it is said, stands in the place of the insured. But how? to use his name, subject to all his disadvantages. Suppose that the insured recovers a full satisfaction, it remains to be de-

terminated that a verdict between different parties would bar the insurer, who was no party to it. That would require great consideration. It was held in *Mason v. Sainsbury* that the rules of strict law are to be applied to the hundred.

There is no convenience in maintaining this action; but is there no inconvenience? Suppose there are a hundred different insurers, there will be as many actions, and another by the insured, if he is short insured; and yet, according to *Mason v. Sainsbury*, he might recover the whole in one action. The Court ought to prevent multiplicity of suits.

Recourse has been had to an admission of counsel in *Mason v. Sainsbury*, that the insurer might recover in his own name for the running down of the ship; I deny it. Two decisions were mentioned in that case, which I will state: If a landlord has covenanted to indemnify his tenant against trespassers, and does accordingly indemnify him, still the action against the trespasser must be brought in the name of the tenant. Another case was admitted by the Court, that in escape, the whole debt having been recovered against the sheriff, still the action against the defendant must be in the plaintiff's name for the benefit of the sheriff (h).

A right of action cannot be transferred. Can the insurer bring an action immediately on the loss occurring? If he can, it must be a vested interest; if not, he cannot, by payment subsequent, which is his own act, entitle himself. I agree entirely with the judgment in *Mason v. Sainsbury*. This has been likened to the case of an escape against the sheriff, and the sheriff afterwards suing the gaoler who suffered the escape; there is, however, no such resemblance. The gaoler is the servant of the public; he is liable immediately on the escape: and besides, such actions are usually brought on the security given to the sheriff. I think there should be judgment for the defendants.

ASHURST, *Justice*.—I am sorry to differ. This case is clearly within the words of the statute of *George I.*, because the plaintiffs are injured. That statute is modelled after

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(h) But see *Sheriffs of Norwich v. Bradshaw*, B. R., H. 29 Eliz., Cro. Elis. 53; *Salteston v. Payne*, B. R., T. 33 Eliz., Cro. Elis. 235, 4 Bac. Ab. 399. If, indeed, the sheriff should sue in the name of the original plaintiff, the defendant can neither plead nor give in evidence the judgment obtained against the sheriff. *Per* ABBOTT, C. J., *Hunter v. King*, B. R., H. 1 & 2 G. 4, 4 B. & A. 210.



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the statute of *Hue and Cry*. There is no case in which a man may not maintain an action upon the case from a damage arising from the act of another. There may indeed be *damnum absque injuriâ*; but where there is an *injury*, I know of no exception to the rule. The practice of insuring is beneficial, and is countenanced by the legislature. *Mason v. Sainsbury* shows that the insurer is entitled either directly or obliquely to recover. Although a right of action cannot be transferred, yet two persons may have a right of action for the same injury, *diverso intuitu*. On an agreement to build a house, which is destroyed before it is finished, I think the hundred would be liable to each party interested in proportion to his loss in separate actions. It is argued, that on payment the insured becomes a trustee, but he is not so until he brings his action, unless he stipulates to bring an action. It is not necessary that the injury and action should arise immediately on the act done. It arises from the subsequent act. Can the owner, after being paid by the insured, recover against the trespasser? Certainly he can. So he may against the hundred; and when he recovers he is a trustee for the insurer. But the insurer may also bring an action in his own name, because when he has paid he is damnified. It has been said that the insurer has no remedy but in the name of another, who may release, and who only can be compelled in equity. That is so new a case that I cannot conceive that the law meant it here. The great difficulty is, that both the parties may bring actions at the same time, but there may be relief by *audita querela*. A fact is admitted by the demurrer which ought to stop the defendants' mouth. I see no objection to the averment, as the jury have told their reasons. I think that judgment should be for the plaintiffs.

WILLES, *Justice*.—It is admitted on all hands that the plaintiffs have received *damnum cum injuria*. I admit that a man cannot transfer his right to a chose in action; but if the insurer had an original right, he may elect to sue in his own name or in that of the insured. It is admitted that the verdict in *Langdale v. Kennett* was wrong; but the defendants could not move for a new trial in that cause, to which they were not parties. I do not feel the difference made between the injury at the time and on payment. They became liable immediately. This is not like a wager; it is an insurance on the house, and gives an interest in it.

A mortgagee might maintain an action under this statute. An insurer could not bring trespass for running down a ship, for want of possession, but perhaps he might maintain an action on the case. I think an action by the insured, as trustee, would be a bar to an action by the insurer. So a collusive release might be got over. I think judgment should be for the plaintiffs.

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Lord MANSFIELD.—My leaning is strongly in favour of the plaintiffs, if the case will bear me out; for otherwise they must lose a sum of money for want of a remedy, and from the mistake of a jury in finding against the direction of the Judge. If, by law, either *Langdale* or the plaintiffs might sue, I have no doubt that it may be shown from what passed at the trial, that the sum sought to be recovered was not included in the damages, otherwise the plaintiffs might recover against *Langdale*, and show the verdict as conclusive evidence. I agree that the plea and replication are immaterial, and that the question is, whether this action could have been maintained in the name of the plaintiffs against the rioters if the statute had never been made? *Langdale* is the sole owner. The relation of the plaintiffs is by the insurance, which is a contract of indemnity. It follows that in respect of salvage the insurer stands in the place of the insured, and *vice versa* as to damage. I take it to be a maxim, that as against the person sued the action cannot be transferred. As between the parties themselves, the law has long supported it for the benefit of commerce; but the assignee must sue in the name of the assignor; by which the defence is not varied. There is no instance of an action in the name of an insurer, while numberless actions have been brought by owners of ships for damage done by other ships, where many of them must have been insured. The case of a sheriff who has paid the whole debt is very strong, for he stands in the place of the debtor, by act of law; yet he must sue in the name of the plaintiff<sup>(i)</sup>. If the insurer could sue in his own name, no release by the insured would bar, nor would a verdict by him be a bar. It is impossible that the insured should transfer, and yet retain his right of action. Trustee and *cestui que trust* cannot both have a right of action. It is a great hardship, for which I cannot find a remedy; but it is better that the

(i) Vide *ante*, p. 251. note (4).

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general rule of law should prevail, that as against the person sued the right of action cannot be transferred, nor the defence varied. As we are equally divided, in order to expedite the bringing of a writ of error, let there be

Judgment for the defendant.

On *Friday*, the eleventh of *February*, 1785, this judgment was unanimously affirmed in the Court of *Exchequer Chamber*.

Monday,  
30th June.

Where a prisoner is supersedeable, he may be detained by the same plaintiff for another cause of action; but if in his affidavit the plaintiff includes the cause of action on which the defendant is supersedeable, the Court will discharge the defendant on filing common bail.

COOKSON v. FOSTER (a).

THE defendant was arrested in last *Hilary* vacation. The plaintiff did not declare in *Easter Term* whereby (*Hilary Term* being reckoned as one (b)) the defendant became supersedeable. After a summons for a *supersedeas* had been taken out, a detainer was lodged against him by the plaintiff for another cause of action, which the plaintiff had no knowledge of at the time of the arrest. In the affidavit accompanying the detainer, the plaintiff had included the debt in the first action. *Cowper* having obtained a rule to show cause why the defendant should not be discharged on filing common bail,

*Chambre* showed cause, and cited *Olmius v. Delany* (c) and *Hutchins v. Kenrick* (d).

*WILLES, Justice* (e), inclined that the defendant should be discharged.

*BULLER, Justice*, said, that there was no doubt that another plaintiff might lodge a detainer against a person supersedeable, and not superseded; that the same plaintiff might do so also, because he could not arrest him, being in gaol; and if he could not lodge a detainer against him, the

(a) *S. C.* cited *Tidd's Pr.* 175, 344, 360, 8th ed. virtue whereof he was taken or charged in custody. *R. H.*,

(b) See *Pullen v. White, B. R.*, *M.* 4 *G.* 3, 3 *Burr.* 1448. 26 *G.* 3, *Tidd's Pr.* 345, 8th ed.

(c) *B. R.*, *M.* 18 *G.* 2, 2 *Str.* 1216.

(d) *B. R.*, *T.* 33 & 34 *G.* 3, 2 *Burr.* 1048.

(e) Lord MANSFIELD was absent.

defendant would be out of the reach of all process, which could not be. A prison was not a protection, and there was no drawing any line but the being actually superseded.

But the plaintiff having included in the detainer the original debt, as to which the defendant was clearly super-sedeable, the Court, on that ground, granted the rule without costs, *BULLER, J.*, observing, that he knew of no case where the Court had obliged the defendant to give bail for a part of the sum in the affidavit.

Rule absolute (*f*).

(*f*) [In general it is a rule not to go into the affidavit to hold to bail. Here it was necessary, in order to show that it was for a different cause of action; and being gone into, the reason for not holding to bail for a part ceases. But the plaintiff's conduct had been oppressive; the defendant had been detained for £300, when perhaps he might have found bail for £100.]—*Note by Mr. Wilson.*

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*BUSH v. LEAKE (a).*

Tuesday,  
1st July.

**D**EBT on bond. The defendant prayed *oyer* of the bond, and condition, which were, for the payment of £5000 and interest at the times therein mentioned, viz. £125, being half a year's interest, on the second of *January*, and £5125, being the principal, and another half year's interest, on the second of *July*; and also for the performance of covenants in an indenture between the parties, of the same date. The defendant then set out the indenture, which contained covenants for the above payments, and several other covenants; and pleaded that he had paid the £125, according to the condition and indenture, and that he had paid the £5125, according, &c.; and also that he had performed all the covenants on his part to be performed contained in the said indenture; and this he is ready to verify. Replication, that the defendant hath not at any time paid the £5125, in manner and form, and concluded to the country. Demurrer, assigning for cause that the replication ought to have concluded with an averment.

Debt on bond, conditioned for the payment of £5000 at certain times, and performance of covenants in an indenture. Plea, stating the payment of the money at the times, and performance of the covenants. Replication, that the defendant did not pay the money *modo et forma*, and concluding to the country. Special demurrer, on the ground that the replication ought to have concluded with a verification.

Held, that the conclusion to the country was good.

(*a*) *S. C.* cited 2 *T. R.* 441.

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*Gibbs*, for the defendant.—The plaintiff has selected one fact of the plea, and has concluded to the country. The principle is now incontrovertibly established, that in such case he ought to conclude with a verification. *Smith v. Dover* (b). Here the plea consists of several allegations, of which the plaintiff selects one. *Mulliner v. Wilkes* (c), decided last term, came as near as possible to the verge of the rule; for it is difficult to conceive how the issue there could have been proved without proving the corrupt agreement; and yet the conclusion to the country was held bad.

WILLES, *Justice*, (stopping *Bower*, who was to have argued against the demurrer).—Here is an affirmative and a negative; and the material fact in dispute between the parties is in issue.

BULLER, *Justice*.—I adhere to the rule I laid down in the cases cited. But a part of it is omitted; it is when part is denied *with a traverse*. All the cases since I came into the Court have been on traverses. Here there is none, and could have been none. The cases are either where the defence consists of several distinct facts, making one point; or where it consists of several distinct points. In the first the replication denying one of the facts must conclude to the Court. In the other class of cases, where the defence consists of distinct points, as here, where the defendant is bound to do distinct acts, he must plead each of those acts separately, and it is not double. In such case the plaintiff cannot take a formal traverse. He may reply to each as if they were separate pleas; and denying the whole of one point, he must conclude to the country.

The plea of a right of common belongs to the class of cases where only one fact can be traversed. The other class of cases are where the plea contains several independent facts, as here, different conditions to be performed. It is enough to put the whole of one of these facts in issue. In such cases the defendant may plead separate facts, without his plea being double. Here there could be no formal traverse, because there could be no fact for inducement. Immaterial matter cannot be inserted by way of inducement. His Lordship cited two cases, of *Ash v. Walker* (d) and *Coulthurst v. Coulthurst* (e).

(b) *B. R.*, T. 20 G. 3, *ante*,  
vol. ii. p. 428.

(c) *Ante*, p. 218.

(d) *B. R.*, 19 G. 3, cited *ante*,  
vol. i. p. 95.

(e) *C. B.*, 12 G. 3.

[*Gibbs* stated, and he was confirmed by *Law*, that in *Mulliner v. Wilkes* there was no formal traverse. *BULLER, J.*, said, that there was no *absque hoc*, &c.; but that there was a traverse by the words "and not." This also *Law* denied, and said that he had carefully avoided those words.]  
Judgment for the plaintiff (*f*).

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(*f*) In a note to this case, *Mr. Wilson* observes, "The distinction seems to be, that when the plea contains a combination of dependent facts, one of which is denied, there must be a verification; but that when it contains separate independent facts, a denial of one should conclude to the country."—See the notes to *Mulliner v. Wilkes*, ante, p. 218.

ROBSON v. HYDE, Esq.  
(Reported, *Caldecott*, 310.)

Tuesday,  
1st July.

FRENCH and Others, Assignees of Cox, v. FENN (*a*).

Tuesday,  
1st July.

THIS was an action for money had and received by the defendant to the use of the plaintiffs, as assignees. The defendant pleaded the general issue, and gave notice of set-off. The cause was tried before Lord MANSFIELD at *Guildhall* after last *Hilary Term*, and a verdict found for the plaintiffs, with £1008, 14s. damages, subject to the opinion of the Court on the following case:

On the twenty-fourth of *January*, 1778, the bankrupt *James Cox*, the defendant, and *Mr. John Halford*, came to the following agreement: "*London*, 24th *January*, 1778. Purchased this day of *Mr. John James Le Jeune* a row of pearls, at the price of £2050, including his commission; the said sum being advanced by *Thomas Fenn*, Esq., with an agreement that the profit and loss thereon shall be equally divided between *Mr. John Halford* and *James Cox*, with the said *Thomas Fenn*, Esq., in thirds. We, the undersigned, do hereby engage to pay two thirds of the interest thereon

The defendant and one *Cox* purchased a string of pearls with money advanced by the defendant, and agreed that the profit and loss thereon should be equally divided. *Cox* paying his share of interest till the pearls were sold. *Cox* became bankrupt, being indebted at that time to the defendant. The pearls were afterwards sold, and the money was received by the defendant.

In an action by the assignees of *Cox* for his share of the money received, it was held that the defendant was entitled to set off the debt due from *Cox* to himself, this being a case of mutual credit within the statute 5 G. 2, c. 30, s. 28.

(*a*) *S. C. Cooke's Bankrupt Law*, 565, 8th ed.  
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from the twenty-fourth of this instant *January* till the time that the said row of pearls is sold and the purchase-money reimbursed him. As witness our hands, *John Halford, James Cox.*"

In *November*, 1778, a commission of bankrupt issued against the said *James Cox*, and afterwards the defendant sent the row of pearls to *China*, where it was sold for the sum of £6000 sterling; and after deducting for commission and some incidental charges, the net sum remitted to the defendant was £5722, 10s.

The said *James Cox* was at the time of his bankruptcy indebted to the defendant in a much larger sum than the share of the profits of the said row of pearls now claimed by the plaintiffs, as his assignees, under the said agreement.

The question for the opinion of the Court was, *Whether* the plaintiffs were entitled to recover.

The case was argued in *Easter Term last* by *Davenport* for the plaintiffs, and *Baldwin* for the defendant.

*Davenport.*—The single question is, whose property this row of pearls was at the time of *Cox's* bankruptcy? for if it was the joint property of the three, then *Cox's* share vested in his assignees, and may be recovered by them in this action. But the defendant has given notice of, and claims a set-off. Whether that set-off can be allowed, must depend on the situation of things at the time of the bankruptcy. Now at the time of the bankruptcy the three parties were interested in the string of pearls, as in so much partnership property; and there was nothing like a debt due from *Fenn* to *Cox*. Put the case of a ship, the property of three joint owners, of whom one becomes bankrupt, the third of the ship vests in the assignees; and whenever the ship is afterwards sold, that share of the ship is liable only to the debts at the time of the bankruptcy, not to any specific claim of the person into whose hands it shall afterwards come. Suppose there had been three rows of pearls, all of equal value; here each of the owners would have had a right to one row. The assignees would have been entitled to one; and how could their claim be defeated by the subsequent sale of the pearls?

*Baldwin*, for the defendant.—The defendant had, originally, the whole property in the pearls; he paid for them, and the agreement between him and *Cox* was only for the profit and loss to be made on them. A court of equity

would, upon a bill being filed, give the defendant the benefit of a set-off. *Ex parte Deeze* (b). [BULLER, J.—Can you support this on the statute of mutual debts (c)? *Wilson* stated, that the case of *Deeze* was decided by the Chancellor on the ground of that statute, and not on the ground of lien. To this Lord MANSFIELD assented. BULLER, J.—Were there at any time mutual debts here? It seems to me that the bankrupt could never have called on the defendant for these pearls. *Baldwin*.—It is a continuation of the contract.]

The case having stood over for a further argument, it was now argued by *Lee*, S. G., for the plaintiffs, and by *Wilson* for the defendant.

*Lee*, for the plaintiffs.—It is meant to be contended on the other side, that the defendant, who had a prior demand to a larger amount, may avail himself of it as a set-off. There is no case in point on the subject. The cases of *Ex parte Prescott* (d) and *Ex parte Deeze* were meant to give a large extension to the statute 5 Geo. 2, c. 30; and it cannot be expected that the doctrines laid down in those cases, and which have since been acted upon, should be now overturned. But none of those cases go to the length of the present. Here there was nothing at all due from the defendant to *Cox* at the time of the bankruptcy, either in present or in future. The debt was all due from *Cox* to the defendant. The defendant had advanced the whole sum for the pearls. They were sent to *China* after the bankruptcy, and the remittance of the proceeds did not take place till some years afterwards. The words of the statute, “that where there have been mutual debts between the bankrupt and any other person at any time before such person became bankrupt,” will not admit of any debt or credit which was not mutual at the time of the bankruptcy. At that time there was an end of every prospect of a debt which could be set off. If the defendant had gone, and desired the commissioners to take the account between himself and the bankrupt, it could not have been done. It was uncertain whether any thing would ever be due. The act of Geo. 2. must be read on the other side: “Mutual debts between the bankrupt and any other person at any time before or after such person became bankrupt.”

(b) 1 Atk. 228.

(d) *Canc.* 1753, 1 Atk. 230.

(c) 5 G. 2, c. 30, s. 28.

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LORD MANSFIELD (stopping *Wilson*).—Nothing can be plainer. The act was accurately drawn to include cases where the debt has not arisen, but may arise in consequence of credit. *Fenn* gave *Cox* credit for advancing the purchase-money, and *Cox* gave credit to *Fenn* by trusting him with the pearls; and in consequence of having the pearls, *Fenn* gave *Cox* credit in other articles. He would not probably have done so but for the possession of the pearls. The justice of the case also is with the defendant.

WILLES, *Justice*.—The case of *Ex parte Deeze* is stronger than the present.

BULLER, *Justice*.—The argument for the defendant goes on the supposition that there is no distinction between mutual debts and mutual credits; but the statute, and all the cases in equity, show that there is such a distinction. It is true that here there was no cause of action till the pearls were sold; but then there were mutual credits before. As to *Fenn* proving his debt, there would have been no difficulty; he would have said, "I have no security but certain pearls, the profit upon which I claim to have in such a proportion." It is like the common case of a creditor having an additional security.

*Postea* to the defendant (*e*).

(*e*) See *Ex parte Ockenden*, 89; 4 *B. Moore*, 515, *S. C.*; 1 *Atk.* 234; *Olive v. Smith, C.* *Easum v. Cato, B. R.*, *T.* 3 *B.*, *T.* 53 *G.* 3, 5 *Taunt.* 56; *G.* 4, 5 *B. & A.* 861; 1 *D. & Thomas v. Da Costa, C. B., T.* *R.* 530, *S. C.*; *Key v. Flint*, 58 *G.* 3, 8 *Taunt.* 345; 2 *B. C. B., M.* 58 *G.* 3, 8 *Taunt.* *Moore*, 386, *S. C.*; *Rose v.* 21; 1 *B. Moore*, 451, *S. C.*; *Hart, C. B., T.* 58 *G.* 3, 8 *Ex parte Flint*, 1 *Swanst.* 30. *Taunt.* 499; 2 *B. Moore*, 547, The 5 *G.* 2, c. 30, s. 20, is re-*S. C.*; *Sampson v. Burton, C.* enacted by 6 *G.* 4, c. 16, s. 50. *B., T.* 1 *G.* 4, 2 *Bro. & Bing.*

Wednesday,  
2d July.

ATKINS et Al. v. DAVIS et Al.

(Reported, Caldecott, 315.)

Wednesday,  
2d July.

THE KING v. PETER WALDO, Esq.

(Reported, Caldecott, 358.)

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Thursday,  
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LORD PORCHESTER v. PETRIE (a).

THIS was a writ of *audita querela*, and the writ set out first the record in the action of *Petrie v. Lord Porchester*. The declaration in that cause stated, that on the second of *September*, 20 Geo. 3, a writ issued for an election at *Cricklade*; that on the fifth of *September* the sheriff issued his precept, and on the eleventh the election was had, when *Benfield*, *Macpherson*, and *Petrie* were candidates; and that *Macpherson* was the friend of Lord *Porchester*. Then followed one hundred counts for bribery by Lord *Porchester*, or his agent *Bristow*, of fifty different persons, all laid on the eleventh of *September*. The declaration was of *Easter Term*, 21 Geo. 3, and the cause was tried on the twenty-eighth of *July*, 1781, when a verdict was found for *Petrie* on ten of the counts. After this was stated the judgment for £5000 and £215 costs. The *audita querela* then stated, that before the said election, viz. on the eleventh of *September*, one *W. Hinton* did corruptly ask the said Lord *Porchester* to give him, &c.; that after committing the said offence by the said *W. Hinton*, and after the committing of the said several offences by the said Lord *Porchester*, within twelve months after the election, viz. on the twenty-first of *May*, 1781, Lord *Porchester* discovered to *Richards* the offence of the said *W. Hinton*, &c., Lord *Porchester* not having been then convicted, &c.; that in *Trinity Term*, 21 Geo. 3, *Richards* impleaded *Hinton*; then followed the declaration against *Hinton*, containing four counts, for bribery, on the eleventh of *September*—the *postea*, twenty-eighth of *July*—verdict for *Richards* on one count for £500—the judgment against *Hinton*, which was *Tuesday* next after the morrow of *All Souls*, as was also the judgment in *Petrie v. Lord Porchester*; that the said judgment continued in force, as Lord *P.* was ready to verify; which said offence, whereof the said *W. Hinton* was convicted, was the same offence which Lord *Porchester* so

All judgments relate to the first day of the term; and the priority of one of two judgments signed on the same day cannot be averred. A person discovering another person who is indemnified from the penalties of the stat. 2 Geo. 2, c. 24, is not a discoverer within that statute, nor indemnified.

(a) S. C.; but not so fully reported, and without the arguments of counsel, 2 *Saund.* 148b, n, 5th ed.; cited *Tidd's* *Pr.* 935 n, 9th ed. S. C. fully reported, *Cricklade Election Case*, p. 416.

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discovered. "And although the said Lord *Porchester*, by reason of the said discovery and conviction, is, and ought to be, indemnified and discharged from the said penalties and costs so recovered against him by the said *Samuel Petrie*, and the disability upon the said judgment; nevertheless the said *S. Petrie* unjustly threatens to sue out execution," &c. The record then further stated that Lord *Porchester* sued out a supersedeas and process against *Petrie*, and the appearance; then Lord *Porchester* declared on the *audita querela*.

The defendant *Petrie* pleaded, that before the said election, viz. on the eleventh of *September*, *Robert Hopkins*, a voter, corruptly took and received, &c.; that after the committing of the said offence, and after the offence by *Hinton*, and before Lord *Porchester* made the discovery to *Richards*, viz. on the thirtieth of *September*, 1780, *Hinton* discovered to *Petrie*; that before Lord *Porchester* made the discovery to *Richards*, viz. on the twenty-first of *May*, 1781, *Petrie* sued out a writ against *Hopkins*, and in *Trinity Term* following declared against him. The plea then stated the proceedings in the action of *Petrie v. Hopkins*, in which the *Nisi prius* day was also on the twenty-eighth of *July*, 1781, and the judgment *Tuesday* next after the morrow of *All Souls*, 22 *Geo. 3*; that the said judgment remains in force, &c. and that the said offence is the same offence, &c.; and the said *Petrie* avers that the said judgment so given against the said *Robert Hopkins* was, in fact, given before the said judgment was given, &c. against the said *W. Hinton*, in the said action so commenced against him by the said *G. Richards*, whereby *Hinton* was indemnified; and the said *J. Petrie* further saith, that the said *W. Hinton*, twelfth *February*, 22 *Geo. 3*, sued out a writ of *audita querela* against *Richards*, which is now depending. Verification.

To this plea Lord *Porchester* replied, that the judgment against *Hinton*, in the action by him against *Richards*, was given before the judgment against *Hopkins*, and traversed that the judgment against *Hopkins* was given before the judgment against *Hinton*; and this he is ready to verify.

*Petrie* rejoined, that the judgment against *Hopkins* was given before the judgment against *Hinton* and this *Petrie* prays may be inquired of by the country.

To this rejoinder Lord *Porchester* demurred, and assigned for cause, that it appears by the proceedings in this cause,

that the judgment against *Hopkins* and the judgment against *Hinton* were given at one and the same time, that is to say, on the same *Tuesday* after the morrow of *All Souls*, and therefore the averment that the judgment against *Hopkins* was given before the judgment against *Hinton* is wholly inadmissible, or if it were admissible, yet that the matter therein averred, being matter of record, ought to have been verified by the record of the said judgment, and to have been determined by the Court here; whereas the said *Petrie* hath endeavoured to put the same in issue to be tried by the country; and for that the said *Petrie* hath not offered to verify his plea, and the matter therein alleged by the record of the said judgment, or by any record whatever. The defendant joined in demurrer.

The case was argued in *Hilary Term* by *Baldwin* for the plaintiff, and by *Wood* for the defendant.

*Baldwin*, for the demurrer.—There are two objections in point of form assigned as causes of demurrer. 1. Matter has been put in issue to be tried by the country which is matter of record, and to be tried by the Court. It will be in the recollection of the Court, that several motions were made in these causes, and that all the rules were dismissed; the Court directing that judgment should be entered up in all the causes, in the same manner as if the motions had never been made (*b*). Judgment was therefore, in fact, given at the time of that direction, and the accidental priority of one judgment will not be material. The Court did not mean that the parties should run a race for judgment. It is averred that judgment was *given* first, not *signed* first, in *Hinton's* case. This is no matter of fact. 2. The averment of one judgment being given before the other, is inadmissible as the record stands, for both are stated to have been on the same day. Every judgment, unless for some particular purpose, refers to the first day of the term. *Hutchinson v. Thomas* (*c*), *Jackson, q. t.*, v. *Gisling* (*d*). The Courts have always avoided fractions of a day, to pre-

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(*b*) See the *Crichlade Case*, p. 410.

(*c*) *B. R.*, *T. 27 Car. 2*, 2 *Lev.* 141.

(*d*) *B. R.*, *T. 15 G. 2*, 2 *Str.* 1169. These two cases were on informations on penal

statutes. Plea, another information of the same term generally. On demurrer, judgment for the plaintiff, because the particular days ought to have been averred.

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vent confusion, and have permitted them only for the purposes of justice. *Pye v. Cook* (e), *Johnson v. Smith* (f).

Having disposed of the special causes of demurrer, the substance of the plea is to be considered. The plea alleges that *Hinton* discovered to *Petrie*, who thereupon sued and obtained judgment, but that an *audita querela* is depending. There are two objections to this plea: 1. That by the defendant's own showing it appears that *Hinton's audita querela* is still depending, and that therefore it is uncertain whether he is liable or not; and secondly, that supposing the plea to be true, and that *Hinton* will succeed in his *audita querela*, still Lord *Porchester* is entitled to his exemption, under the clause in the act. The moment judgment was obtained, on Lord *Porchester's* discovery and information, his exemption was complete. Suppose that the king should pardon an offender, in a case where a reward is annexed to the conviction, the right of the informer would not be thereby divested. In all cases of rewards on convictions, the right attaches immediately in the verdict. In *Gunn's case*, tried at *Salisbury*, the defendant was permitted to give in evidence the record of a judgment against *Bristow*; and it was held sufficient, although *Bristow* was entitled to his *audita querela*, and on bringing it would be exempted.

*Wood, contra.*—The Court will dismiss from their memory every thing that is not on the record. Lord *Porchester* ought to have taken the objection to the plea earlier. He cannot now take it, after having offered a traverse. [Lord *MANSFIELD* and *BULLER, J.*, said, that as this was not matter of form the plaintiff might go back to the first fault.] The objection is matter of form, but, whether form or not, if the plaintiff offers an issue, he cannot afterwards avail himself of matter of law. To permit this would be highly inconvenient. The objection is that the matter is triable by the record. Certainly matter of record must be tried by the record, but that is matter contained in the record. Here there is no dispute as to what is contained in the record. According to it, both the judgments are on the same day; the defendant does not deny this, but he alleges a priority on the same day. This fact cannot be tried by the record, for it does not appear on the record. A judgment given a

(e) *B. R.*, T. 14 Jac. 1, *Hob.*  
128, *Moor*, 864, *S. C.*

(f) *B. R.*, E. 33 G. 2, 2  
*Burr.* 950; 1 *Blackst.* 207, *S. C.*

month later than another may stand first, for all judgments are entered as first brought in. The time of signing judgment is triable *in pais*, and not by the record. [Lord MANSFIELD.—The great question is, can you by law say they were of different days?] By law a man may be permitted to aver a material circumstance which does not contradict the record. The cases of *Hutchinson v. Thomas* and *Jackson v. Gisleng* are strongly in favour of the defendant. In the first it was held that the defendant ought to have averred the particular days in the term when the informations were exhibited. This shows that, though in law the term is only one day, yet that an allegation may be admitted that an information was exhibited in an earlier part of the same legal day. The latter case is to the same effect. Both of these cases were cited in *Combe v. Pitt* (g), where the principle of the decision was, that priority of time may be averred if it be material, and that although the law does not in general allow fractions of a day, yet it will allow fractions even of an hour where it is material to distinguish. In *Smallcomb v. Buckingham* (h), which was an action against a sheriff who had received two *fi. fa.*'s on the same day, and executed the last first, the Court said that if two writs come to the sheriff the same day, he ought to execute that writ first which came to hand first, and that in such case there is a *prius* and a *posterius* in the same day. If this be the rule with regard to writs, why will it not hold with regard to judgments? There are no authorities to the contrary, and those already cited are in favour of the plea. In *Hynde's case* (i), it became material to ascertain the precise day of an enrolment, which appeared to be generally of the term. It was contended, that as it did not appear by the record what day of the term the deed was enrolled, but generally of *Easter Term*, it should be intended to be enrolled the first day of that term; and it was said, as in this case, that the effect and validity of the record would be tried by the country, which would be against the rule of law. But the Court held the averment good, and that it did not impugn any thing apparent upon the record. They also held, that although the enrolment, or other matter of record, could not

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(g) B. R., T. 3 G. 3, 3 320.

Burr. 1423.

(i) B. R., T. 33 Eliz., 4

(h) B. R., M. 9 W. 3, Salk. Rep. 70 b.

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be tried by the country, yet that the time when the enrolment was made should be tried by the country. The time of receiving a writ or of signing a judgment is not matter of record, but matter extrinsic.

With regard to the substantial part of the plea, it is objected that an *audita querela* is stated to be brought by *Hinton*. It may be admitted that that alone would not be sufficient, but the facts are stated which entitle him to his indemnity. The mention of the *audita querela* is only introduced to show that he has not been guilty of any *laches*. The Court will not construe the statute verbally, but will give it substantial effect. It would be absurd that the discovery of an indemnified person should indemnify the discoverer. It is meant that the party indemnified should be the means of bringing somebody to justice. If it were otherwise, a discovery might as well be made by notice in the *Gazette*. *Hinton's* action was commenced before Lord *Porchester's* discovery, and he has also the priority of judgment. At the moment of judgment being given he was pardoned; but as no plea *puis darrien continuance* could be pleaded, judgment was entered against himself in form. But *nihil operatur*.

LORD MANSFIELD.—The great question is of much national importance, and has not been gone into. It is this—what completes the discovery, and to what time does it relate? If it can be said that the judgments are of different times, there is no way of trying that question but by the country. If not, there is nothing which a jury can try. It is an ancient and fundamental maxim, that judgments and acts of parliament are of the first day of the term or of the session. As to judgments, for the sake of a lien on land, an exception has been introduced by statute. A fiction shall not be contradicted in order to defeat the ends of that fiction, but it may be contradicted if its objects are not thereby destroyed. To comply with particular statutes these averments are admitted. This doctrine was much gone into in *Forster v. Bonner* (*k*), in which I took a good deal of pains.

The case stood for further argument, and in *Easter Term* (20th *May*) was argued by *Batt* for the plaintiff, and by *Bearcroft* for the defendant.

*Batt*, for the plaintiff.—By the established rules of law

(*k*) *B. R., E. 16 G. 3, Cowp. 454.*

no fractions of a day can be admitted, and in giving judgments the term is considered as one day. Whatever the reasons may be upon which the rule was originally founded, it is now well established, and is not to be disputed. Before the statute of frauds, even purchasers for a valuable consideration were concluded by judgments signed during the term, and relating to the first day. The Court, even in that hard case, could not dispense with the rule without a statute. As to judgment creditors the rule still holds. The relation of judgments appears from various cases. *Oder v. Woodward* (l), *Fuller v. Jocelyn* (m), *Peters v. White* (n), *Chancy v. Needham* (o), *Deakin v. Cartwright* (p). It will be said, on the other side, that convenience requires that the rule should be departed from. The answer is, that no greater hardships can be imagined than occurred in the cases just cited. All acts of parliament relate to the first day of the session. 4 *Inst.* 25, *Panter v. Attorney-General* (q). In *Anderson's Reports* (r), it is said that if clergy is taken from an offence by an act of parliament, a person guilty of the offence between the first day of the session and the passing of the act shall be deprived of his clergy. But it will perhaps be said on the other side, that it is not intended to deny the doctrine of relation, but that the object is to show priority on the day to which the judgments relate. The answer is, that no instance can be shown in which the Court has taken notice of a fraction of a day in the entry of judgments. The statute of frauds affords an argument against admitting such a doctrine, for it only directs the *day* of the judgment being signed to be marked, and takes no notice of the *hour*, or of priority on the same day. If such a doctrine should be established great inconvenience would be caused. It would be a race for judgment, and the swiftest legs or the longest arm would prevail. It would depend upon the personal agility of the attorney whether his client should gain or lose £10,000. The cases which have been

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(l) *B. R.*, *E.* 1 *Anne*, 2 *Lord Raym.* 766, 849; *Salk.* 87, *S. C.*

(m) *B. R.*, *M.* 4 *G.* 2, 2 *Str.* 882.

(n) *B. R.*, *M.* 34 *Car.* 2, 2 *Show.* 238.

(o) *B. R.*, *M.* 11 *G.* 2, *Andr.* 53; 2 *Str.* 1081, *S. C.*

(p) *B. R.*, *H.* 12 *G.* 2, *Andr.*

308.

(q) 6 *Br. Parl. Ca.* 553. But now, by statute 33 *G.* 3, c. 13, the operation of every statute is to commence from the time of its receiving the royal assent, unless some other period is appointed by the act.

(r) *Vol.* i. p. 295.



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cited on the other side are all distinguishable. *Hynde's case* related to the enrolment of deeds, which are required by law to be enrolled within a certain time, so that an inquiry into the time becomes material. In *Johnson v. Smith* the words of Lord MANSFIELD are in favour of the present plaintiff. "The reason why nobody shall be permitted to aver that a judgment was signed after the first day of the term, or that a *fi. fa.* was taken out in vacation, is, because the fact is not relevant. The legal consequences do not depend upon the truth of the fact on what day the judgment was completed, or the writ of *fi. fa.* actually taken out, but upon the rule of law that they shall be deemed complete, and bind, to all intents and purposes, by relation" (s). In *Smallcombe v. Buckingham*, the question was upon an extrinsic fact, viz. the delivery of the writ to the sheriff. *Combe v. Pitt* was decided upon the priority of *action*.

With regard to the merits of *Petrie's* plea, the *audita querela* is still depending, and it is therefore doubtful whether *Hinton* will be indemnified.

But the most material question still remains to be discussed, whether, upon the fair construction of the statute, Lord *Porchester* is entitled to an indemnity. The statute, which is very penal, and ought not to be extended in its construction, says, that if any person offending against the act shall, within twelve months, discover any other person offending, so that such person so discovered be *thereupon convicted*, then, &c. The meaning of the word *convicted* appears from the cases of *Sutton v. Bishop* (t), and *The King v. Mead* (u). [Lord MANSFIELD.—In vulgar speech conviction means verdict, but in legal language there is no conviction before judgment.] The conviction and the punishment are distinct. Lord *Porchester* has obtained judgment against *Hinton*; *Hinton* is therefore *convicted*, and Lord *Porchester* is indemnified. But it is said that the discovery of a person who is himself indemnified, is not a discovery within the act. The discoverer cannot know whether the person whom he informs against is or is not indemnified. It is a transaction in its nature secret, and shall the informer, after having done all that lay in his power, be barred of his reward on account of a fact which he had no means of

(s) 2 Burr. 967.

(u) B. R., T. 2 G. 3, 3 Burr.

(t) B. R., H. 9 G. 3, 4 Burr. 1335.

knowing? It would be a breach of the promise made by the legislature. Suppose an act of parliament holds out a reward for the discovery of an accomplice, and that the prisoner, after trial, breaks prison, shall the informer lose his reward? [Lord MANSFIELD.—That will depend upon the construction of the act of parliament or proclamation.] There is no case precisely in point, but the case of the approver mentioned in 3 *Inst.* 130. approaches the nearest.

*Bearcroft, contra.*—There are two principal questions on this record: 1. On the construction of the statute; and, 2. On the rule as to the relation of judgments. Lord *Porchester* is the actor, and comes forward to pray of the Court to bar Mr. *Petrie* of his execution on the judgment he has obtained against him. Lord *Porchester's* case is this: he says, "It is true, Mr. *Petrie* has recovered four judgments against me; yet he ought to be barred, because I am a person entitled to an indemnity on the true construction of the act; and the grounds of my indemnity are, that one *Hinton* has been proceeded against on my discovery, and was prosecuted to conviction before I was." To this Mr. *Petrie* answers, "All that you allege may be true, but *Hinton* is himself an indemnified man, by having discovered *Hopkins* before you made the discovery of *Hinton's* bribery; and the judgment against *Hopkins* was prior to the judgment against *Hinton*." The statute requires that some person who has been guilty of bribery should be punished. The discoverer is *indemnified and discharged from all penalties and disabilities*; but it is clear that the statute only intended that he should be discharged in case he substituted some other offender in his place to bear those penalties and disabilities. But if *Hinton* was indemnified, no such person was substituted. Unless this be the true construction of the act, out of the three persons who have offended against the law, only one would be punished. Lord *Porchester* and *Hinton* would escape, and *Hopkins* alone would be punished.

Upon the second question the defendant contends that he was entitled to aver priority of judgment by the fraction of a day. No reason has been assigned for the rule which directs the relation of judgments. Whenever good sense and the policy of law requires that rule to be dispensed with, it must yield. *In fictione juris consistit æquitas*. It is true that an averment that a writ issued in vacation will be bad for the purpose of destroying the writ; but whenever

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equity and good sense require that the time of commencing the action should be ascertained from the issuing of the writ, such an inquiry is allowed, as was settled in *Johnson v. Smith*, which was a very elaborate judgment. It is true that it was the case of a writ; but a writ is a record as well as a judgment. All the arguments in *Hynde's case* apply here. It was an enrolment; but the operation of an enrolment arises out of the circumstance of its being a record (x). In *Swann v. Broome* (y) the Court would not permit a judgment to relate to the first day of term, because it could not be prior to the return. [Lord MANSFIELD.—The rule laid down in that case was, that a judgment relates to the *essoin* day of the term, unless any thing appears *upon the record* to the contrary, showing that the judgment cannot have that relation.] It is not necessary to ask the Court to violate the rule of relation to the first day of term. The defendant only wishes to have his priority on that day recognised. The two judgments could not have proceeded *uno flatu*, whether pronounced by the Court or written by the officers. The statute of frauds, it is true, only requires the day to be marked, but the register act for *Middlesex* directs the hour to be noted (z).

But there is another relation to be attended to—the relation of the discovery from the time of judgment, which carries the indemnity back to the time of discovery. *Hinton* then had an *inchoate* indemnity, and the discoverer runs the risk of the person discovered being indemnified.

Lord MANSFIELD.—The general question is, whether Lord *Porchester* has convicted any one, not having been before convicted himself? If the fraction of a day can be gone into, then *Hinton* has a judgment prior to Lord *Porchester's*. If the question of the fraction of a day cannot be gone into, *Hinton* is still an indemnified person, and it comes to this—Is the discovery of an indemnified person sufficient?

As to the fraction of a day, fictions are instituted for general utility and the furtherance of justice. The ground of the rule, that there shall be no priority of judgment, was to prevent all confusion, and all races for preference. No fiction is allowed to be questioned for the purpose of over-

(x) As to an enrolment of a deed being a record, see *Wy-mark's case*, B. R., M. 35 & 36, El. 5 Rep. 74 b; 2 Roll. 119, 120; *Gilb. Ev.* 22; *Com. Dig.* Barg. & Sale (B 10).  
(y) B. R., M. 5 G. 3, 3 Burr. 1595.  
(z) The day, hour, and time, 7 Anne, c. 20, s. 6.

turning the ground for which it was introduced. For collateral purposes it may. Thus, the actual period of the commencement of a suit may be shown where a question arises on the statute of limitations, but not for other purposes. The suing out the writ is the commencement for one purpose, the filing of the bill for another. We will consider of the general question, whether the discovery of an indemnified person is a discovery within the statute.

**WILLES, Justice.**—My doubt is, whether, if the judgments be all at the same instant, *Hinton* can be an indemnified person at the time of Lord *Porchester's* judgment. To hold so seems to give him a priority, and to imply that his judgment against *Hopkins* was prior.

*Curia adv. vult.*

On this day the judgment of the Court was delivered by Lord **MANSFIELD**.—This is an *audita querela*, brought by Lord *Porchester*, to be relieved from the effect of a judgment obtained against him by the defendant *Petrie* for bribery. The writ and declaration state, that *Petrie*, in *Easter Term*, 21 Geo. 3, brought an action against Lord *Porchester* for bribery, which was tried in *July*, 1781, and judgment given for the plaintiff on the first day of *Michaelmas Term*, 1781. That, on the 11th of *September*, 1780, *Hinton* was guilty of bribery, and on the 29th of *May*, 1781, Lord *Porchester* made a discovery of it; on which discovery an action was brought by *Richards* against *Hinton*; and that cause was also tried in *July*, 1781, and there was judgment for the plaintiff on the first day of *Michaelmas Term*, 1781; for which reason Lord *Porchester* insists that he is exempt from the penalty recovered against him by *Petrie*.

The plea states that one *Hopkins* was also guilty of bribery; and before the discovery of *Hinton* made by Lord *Porchester*, to wit, on the 20th of *September*, 1780, *Hinton* discovered *Hopkins*; on which discovery *Petrie*, in 1781, brought an action against *Hopkins*, and that action was also tried in *July*, 1781, and judgment was given for the plaintiff on the first day of *Michaelmas Term*, 1781. The plea then avers that the judgment against *Hopkins* was given before the judgment against *Hinton*, and that *Hinton* had sued out an *audita querela* against *Richards*, which is still depending.

The replication traverses that the judgment against *Hopkins* was given first.

The rejoinder takes issue on the traverse.

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To the rejoinder the plaintiff demurs, and assigns for cause, that it appears by the proceedings in this case that the judgment against *Hopkins* and the judgment against *Hinton* are both given at the same time, and therefore the averment of the priority is not admissible; and that being a matter upon the record, it ought to be tried by the record, and not by the country.

Upon this record four points have been made in argument. The first three on the pleadings, and the last on the construction of the statute 2 *Geo. 2, c. 24*.

1. Whether the priority of one judgment over another can be averred, when it is admitted on the record that both judgments were given on the same day.

2. Supposing that such an averment can be made, whether it is a fact that can be tried by the country.

3. Supposing that the question ought to be tried by the record, whether the plaintiff, having in his replication traversed the priority of the judgment, shall be admitted to take an objection to his own traverse.

4. Whether, admitting the judgment obtained by a discoverer to be an indemnity, though of the same day with the judgment against him, a conviction of a person indemnified be an exemption within the statute.

As to the first point. It is laid down in *Johnson v. Smith*, that judgments shall be complete, and shall bind, to all intents and purposes, by relation. This is the rule of the common law, and no authority can be found to contradict it. In *Stanford v. Cooper (a)*, a *sci. fā.* was brought on a judgment in debt obtained in *Hilary Term*; the defendant pleaded a statute acknowledged the 22d of *January*, and on demurrer it was adjudged that the judgment related to the *essoin* day. That was a very strong case, for the statute was acknowledged on the day before the first day of the term, and the Court, which is bound to take notice of its own proceedings, must know and see that the judgment could not be given till the 23d of *January*, and, consequently, was subsequent to the statute. They held, however, that the legal fiction and relation should prevail against the truth and fact of the case. In *Gerrard v. Norris (b)*, the plaintiff was in under an *elegit*, the judgment being given, *Crastin v. Trin*, which was the 20th of *June*. The defendant claimed by virtue of an extent under

(a) *B. R., H. 3 Car. 1, Cro.* (b) *Latch, 53. Car. 102.*

a statute of the same term, but earlier, viz. the 20th of *June*. The reporter adds, he heard that it was adjudged that the plaintiff had the better right, because he claimed to be in under a judgment, and all the term is only one day in law. In that case the attempt was to make a fraction of a day; and the defendant pleaded that his statute was before the judgment, but the Court would not allow it. In *Miller v. Bradley* (c), the defendant moved to have the execution set aside, because the judgment on which it was taken out was not really a judgment till the morrow of the *Holy Trinity*, and so was not sufficient to warrant the issuing of the execution; but the Court said that it was a judgment of the first day of the term in which it was obtained, by relation. It must, from the argument, have been sworn that the judgment was not in truth and in fact given till the morrow of the *Holy Trinity*; but the Court held, that though the fact appeared, the legal relation must prevail.

The cases which have been cited—of *Pye v. Cook* (d), *Hutchinson v. Thomas* (e), *Jackson v. Gisling* (f), and *Combe v. Pitt* (g)—are not applicable. The priority of judgment was not the point in any of them. The question in all of them was the priority of the commencement of the suit, which is the act of the party, while the judgment is the act of the Court. These cases are founded on statutes by which a penalty is given to the party who shall first sue, and on that ground it was determined that the suit first commenced might be pleaded in bar to the others.

There is another string of cases as little apposite: *Johnson v. Smith* (h), *Wood v. Newton* (i), *Forster v. Bonner* (k). All these cases arise on questions concerning the commencement of the suit, whether the *latitat* or the bill is the commencement; and the result of them is, that the bill is, in point of law, the commencement; but that the plaintiff may, by specially stating it, make the *latitat* the commencement; and the true time, if material, may be inquired into and shown. The application for the writ, and suing it out, are

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(c) *B. R., M. 10 G. 1, 8*  
*Mod.* 189.

(d) *Ante*, p. 264.

(e) *Ante*, p. 263.

(f) *Ante*, p. 263.

(g) *Ante*, p. 265.

(h) *Ante*, p. 264.

(i) *B. R., M. 20 G. 3, 1*  
*Wils.* 141.

(k) *B. R., E. 16 G. 3, Cowp.*  
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the acts of the party, and as such may be put in issue. But this general rule of law, like most others, is subject to exceptions. I will mention two, which comprehend all the cases in any degree applicable to the present.

The first exception is where the precise time of signing a judgment, or of doing any other act of record, is made material by statute, as in the case of a bargain and sale enrolled, which must be within six months after execution; or as in the case of a judgment, between purchasers, where, by positive statute, the time of signing the judgment must be marked on the roll, and the judgment shall bind from that time only. *Hynde's* case was determined on the statute. But the exception arising out of positive statute law proves the rule of the common law, for it was that rule alone which made the statute necessary in cases in which the legislature thought an exception from the general rule of law ought to be made.

The second exception arises at common law, where there is a special memorandum, before the bill, of a particular day. In such case, as it appears upon the record when the bill was filed, and as judgment could not be given before the bill was filed, the judgment can only have relation to the time of the filing of the bill. This appears to be the foundation of the judgment in *Hays v. Wright* (l). The first reason given by the Court in that case cannot be supported, for if the award was void there could be no cause of action. The second reason is the only one on which the judgment can be supported. It is there allowed that, in point of law, every judgment relates to the first day of term; but the Court thought it was admitted on that record that the former judgment was given after the 20th of April. So, in the case of *Miller v. Bradley*, the Court held, that if it appeared by continuances that it was not a judgment till a particular day in the term, it should not relate to the first day of the term. It appears also from 3 *Salkeld*, (m) that judgment shall relate to the first day of the term as much as if it had been given on that very day, unless there is a memorandum to the contrary, and continuances till another day. For these reasons we are of opinion that it is not competent to aver the priority of one judgment before another in a case where both judgments are given on the same day.

This opinion makes it unnecessary to consider the two

(l) *B. R., E. 1 Jac. 1, Yelv. 35.*

(m) 3 *Salk.* 212.

other objections which have been argued on the plea ; but whenever it becomes necessary to decide on the mode of trying the priority, the same cases and the same reasons will go a great way to show that it ought to be by the record, and not by the country.

The only remaining question is, whether, taking it for granted that, in general cases, a discovery by the defendant, at the same time that a judgment is obtained against him, will exempt him, such discovery will be sufficient, where the person discovered is himself exempted from all penalties in consequence of another conviction obtained on a discovery made by him.

This is quite a new question, and therefore, to make the matter as intelligible as I can, I will again state, from the record, so much of the case as is applicable to this point, and the arguments which have been used by Lord *Porchester's* counsel. The facts stated in the plea and admitted on the record are, that Lord *Porchester* discovered *Hinton*, and *Hinton* discovered *Hopkins* ; upon which discovery an action was brought, and a verdict and judgment obtained at the same time that a verdict and judgment were obtained against *Hinton* : that *Hinton* sued out an *audita querela* on the judgment obtained against him, which *audita querela* is still depending.

Lord *Porchester's* counsel have urged two different arguments to prove that the judgment obtained on the discovery of *Hinton* against *Hopkins* shall not prevent Lord *Porchester* from enjoying the exemption to which he would otherwise be entitled : first, because the *audita querela* brought by *Hinton* is still depending, and, till determined, *non constat* whether *Hinton* will be exempt or not ; and that though the plea, besides stating the *audita querela* depending, has immediately stated the fact upon which it is contended that by law *Hinton* is exempt, yet the Court ought not to decide upon the fact respecting *Hinton* on this record, as he is not a party to it. As to the *audita querela* being still depending, that fact is alleged only to show that *Hinton* is pursuing his remedy, if, on the facts stated, he is entitled to any, and it is not contended that the mere pendency of it can affect Lord *Porchester* ; but all the facts which entitle *Hinton* to an indemnity are precisely stated on the record, and are, for the reasons I have given in dis-

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cussing the fourth question, sufficient to entitle *Hinton* to his indemnity.

The only part of this objection that remains to be considered is, whether the Court can decide upon this fact, since *Hinton* is not a party. It would be very unequal justice if it could not. Both parties to this record are interested in the event—the legality of the judgment against *Hinton*. Lord *Porchester* insists that he has a right to avail himself of it, and relies upon it as his indemnity. Justice demands that *Petrie* should allege any reasons he can to show that such judgment is ill founded, or of no avail. He can only do so by stating the objection in the manner he has done, for he could neither maintain an *audita querela* nor a writ of error. A judgment is conclusively binding upon those only who are parties: all others have a right to dispute the justice, propriety, and fairness of it, when it becomes material to them to do so. Suppose that *Hinton*, notwithstanding his title to an indemnity, chose to submit and to pay his £500, for the sake of saving as many thousands, to Lord *Porchester*, and therefore brought no *audita querela*—it is impossible that such a judgment could conclude *Petrie*, who was no party to it.

The second ground of argument on behalf of Lord *Porchester* was, that admitting *Hinton* should hereafter be relieved, or had now been relieved, still Lord *Porchester* would be entitled to an indemnity because he had prosecuted *Hinton* to conviction; and it was said that this resembled the case of an indemnity given on a conviction which has been followed by the king's pardon. The case of a conviction upon an indictment and subsequent pardon does not warrant the argument, but the reason applies strongly the other way. In criminal proceedings the verdict is the conviction, and it remains a conviction notwithstanding the effect of it is done away by a pardon. The party who procures such a conviction has performed the condition on which he obtains his indemnity, and the subsequent conduct of the Crown cannot devalue the right of the party. But even there it must be a legal conviction, and capable of being carried into execution, or the discoverer is not *strictly* entitled to his indemnity. Thus, if the prisoner is tried on an insufficient indictment, and, judgment being arrested, is indicted again, the accomplice is bound to appear as a witness on the second trial, or

he will not be entitled to his pardon. So, in this case, the conviction must be legal and sufficient; but in a civil proceeding the conviction can only be on judgment.

This brings it to the question, whether the judgment against *Hinton*, he being indemnified, is such a conviction as entitles Lord *Porchester* to an indemnity. That question in reality amounts to this, Whether a conviction to entitle a person to an indemnity must be such a conviction as may be followed by execution and by punishment, or whether it be sufficient if it be a conviction in form only. The very statement of the proposition decides it. There is no case of a conviction on an insufficient indictment, and the reason assigned in *Sutton v. Bishop* proves that point beyond all contradiction; for Mr. Justice YATES lays it down, that the plain intention of this clause is to substitute another offender in the place of the party discovering, so as to subject him to all the penal consequences of the offence. But Lord *Porchester* has not substituted any other offender in his place who can be the object of punishment. *Hinton* is not liable to any of the penalties or disabilities of the act; and therefore, if such discovery were allowed to exempt Lord *Porchester*, no example could be made, and the law would be rendered of no effect.

It has been contended that Lord *Porchester* has the merit of discovering so far as it was in his own power; and that as the punishment or the escape of the offender does not rest with him, he ought not to suffer for that which it is out of his power to accomplish. The answer is, that whatever may have been the intention of Lord *Porchester*, he has not done that which he undertook to do—he has not brought another offender to punishment. It is upon the performance of that act, and not upon the intention of the party, that the legislature has made the indemnity depend. We are therefore of opinion that there must be

Judgment for the defendant (n).

(n) The doctrine of the relation of judgments to the first day of the term has been recognised and acted upon in a variety of cases. *Bragner v. Langmead*, B. R., M. 37 G. 3, 7 T. R. 20; *Ex parte Birch*, B. R., M. 6 G. 4, 4 B. & C. 880; *Greenway v. Fisher*, B. R., M. 8 G. 4, 7 B. & C. 436, 1 M. & R. 330, S. C.; *Calvert v. Tomlin*, C. B., T. 9 G. 4, 5 Bingham. 1, 2 M. & P. 1 S. C.: see also *Roe v. Hersey*, C. B., M. 12 G. 3, 3 Wils. 275. Judgments have relation to

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Upon this judgment Lord *Porchester* appealed to the *House of Lords*, but the writ of error was subsequently withdrawn, and, on the 17th of *July*, 1783, Mr. *Petrie*

the *essoign* day of the term, which, for this purpose, is considered the first day of the term; *Bolton v. Eyles*, C. B., E. 1 G. 4, 2 B. & B. 51. In the matter of *Burt*, B. R., T. 7 G. 4, 5-B. & C. 668; *Laidler v. Elliott*, B. R., H. 5 & 6 G. 4, 3 B. & C. 743; *Whittaker v. Whittaker*, B. R., M. 9 G. 4, 8 B. & C. 768. But it is said that, in actions by bill, the judgment relates only to the first day of full term. *Per* BULLER, J.; *Richards v. Hinton*, B. R., E. 22 G. 3; and see 2 T. R. 576, *Tidd's Pr.* 967 (n), 8th ed.

The rule, that (except for the purposes of the statute of frauds) judgments must have relation to the first day of term in all cases, was fully recognised in *Greenway v. Fisher*, B. R., M. 8 G. 4, 7 B. & C. 436, 1 M. & R. 330, S. C. "At common law, judgments related to the first day of the term in which they were entered up, in like manner as all acts of parliament related to the first day of the session in which they were passed. I take one reason of this to have been that there was not any mode of ascertaining the precise time at which judgments were signed. By the statute of frauds this rule of law was altered for one purpose, and now the Court can for that purpose ascertain and notice the time when judgments are actually signed. So, if, by the words of an act of parliament, the commencement of its operation is confined to a particular day, that may be noticed by the Court. But, with the exception of those instances,

the old rule of relation still prevails." *Per* Lord TENTERDEN, *ibid.* In the case of *Bennett v. Isaac*, Scacc. E. 3 G. 4, 10 *Price*, 154, the Court of *Exchequer* appear to have considered the rule less strictly. "A judgment of the vacation being considered as referring to the first day of the term is merely a fiction of law; and it may have many good effects, as the rendering a search more easy: but that fiction must not be suffered to work an injustice, and that is an established maxim of the law. The Court, to prevent its operating injuriously, may, and frequently do, inquire of the fact of the actual day on which judgment was entered up, as for the purpose of ascertaining whether the case is within the statute of limitations, and on other occasions of the like nature. By inspection of the record we find that an imparlance was granted till the 23d of *January*; and from the marginal note we learn the precise day on which judgment was actually signed; and the marginal note is part of the record, and it is made so for the express purpose of preventing injustice in consequence of the legal fiction." *Per* GRAHAM, B., *ibid.* 165. "With respect to the fiction under which these judgments are nominally considered of the first day of the term in which they bear *teste*, I think that we may notice judicially that fiction, and correct it by the fact where it may become necessary to the justice of the case that we should do so. For instance, we may take notice that the judgment in this

executed releases to Lord *Porchester*, and powers of attorney to enter satisfaction upon the record.

very case was in fact recovered in that part of the term which was in the second year of the reign of the king; and if an issue, taken on that allegation of *nul tiel record*, had been tried before me, I should have held the allegation well proved by this record; for I should have considered myself at liberty at least, if not bound, to take notice of the fact, when it was necessary to obviate any mischief that might arise from the fiction." *Per Wood, B., ibid.* p. 168.

The extraordinary legal proceedings, arising out of the *Cricklade* election, of which the *audita querela* reported in the text was the termination, are fully reported in the "Report of the *Cricklade* case," &c. *London, Payne*, 1785, and occupy 500 pages. One hundred and thirteen actions were com-

menced by Mr. *Petrie* upon the statute of *George II.*, the records in which were carried down to *Salisbury*: of these one hundred and five were tried, and, in eighty-three, verdicts were found for the plaintiff, amounting in the whole to £41,500. In some of these actions various applications were made to the Court of *King's Bench*, which will be found fully reported in the *Cricklade* case, but which are omitted in the present volume, as the principal points discussed in them were entered into more at large on the argument of the *audita querela*.

In the case of *Benfield v. Petrie* (*Cricklade* case, p. 295), tried at the *Salisbury Lent Assizes*, 1782, Mr. *Burke*, the brother of *Edmund Burke*, appeared for the plaintiff, with Mr. *Pitt* as his junior.

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MORRIS v. SMITH.

Thursday,  
2d July.

THIS was an action of covenant on an indenture of lease of a piece of land for the purpose of sinking coal-pits. Various breaches were assigned, but the material one was, that the defendant, who was assignee of the lease, ought to pay to the plaintiff a certain proportion of the value of nine hundred-weight of coals to be raised, unless prevented by unavoidable accident from working the pit. The plea to this breach was, that the defendant was prevented by unavoidable accident, to wit, by large quantities of water unavoidably coming in and overflowing the coal-mine, and unavoidably continuing and remaining therein: on which issue was joined. The cause was tried before *BULLER, J.*, at the sittings for *Middlesex*, in this term, when it appeared

have been remedied at a greater expense than the value of the coals to be raised. plaintiff was entitled to recover.

Covenant on a coal lease to pay a certain proportion of the value of nine hundred-weight of the coals to be raised, unless prevented by unavoidable accident from working the pit. Plea, that the defendant was prevented by unavoidable accident. It appeared in evidence that the accident might have been remedied at a greater expense than the value of the coals to be raised. Held, that the

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that, after working the mine for some time, great quantities of water came in by faults in the mine, notwithstanding which the stipulated quantity of coals might have been got, but at a greater expense than they could possibly repay. The words in the exception were "merchantable coal." *BULLER, J.*, said, that the defence was certainly not within the words of the exception, but desired the jury to find the facts specially. The jury, however, found for the plaintiff generally. A rule for a new trial having been obtained,

*Bearcroft and Wood* showed cause.—"Merchantable coal" means that the coal when got should be of such a quality as to be saleable. The term has no relation to the expense or profit of getting. [To this Lord MANSFIELD assented.] Is it the meaning of the covenant that the lessee shall have a profitable bargain? Is he to be excused as soon as it becomes a losing bargain? But on these pleadings that question cannot arise. The plea says that the water unavoidably continued and remained in the pit, but the jury have found that it might have been removed. It is immaterial at what expense that removal might be effected.

*Lee, S. G., and Baldwin, contra.*—The covenant must receive a reasonable interpretation, according to the intent of the parties; but it never could have been their intention that the water should be removed at all events, and at whatever expense. Could it have been intended that the lessee should continue to raise coals at this expense for forty-five years, and thus entirely ruin himself? The accident was unavoidable by those means which a person working the mine for his own benefit would use. It could only be avoided at an expense which rendered the profitable working of the mines impossible. The covenant merely meant to guard against the wilful negligence or misfeasance of the lessee, and could never have been intended to embrace a case like the present. [*Baldwin*, on the part of the plaintiff, here offered to accept a surrender of the lease.]

Lord MANSFIELD.—The offer to take a surrender of the lease, and the refusal on the part of the defendant, go a great way towards explaining the real nature of this case, and the intention of the parties. This brings us to the consideration of the covenant. The lessor is to receive a rent in proportion to the coals raised, and therefore it becomes necessary to stipulate that a certain quantity shall be raised. But they are not to be raised in case of unavoidable acci-

dent. Unavoidable accident means an accident physically unavoidable. An interruption for some months will not discharge the lessee. All coal-pits are subject to such accidents. Upon these pleadings the profit does not come in question.

WILLES, *Justice*.—I am of the same opinion.

BULLER, *Justice*.—I am clearly of opinion that the deed will not bear the construction contended for by the defendant, which appears to have been an after-thought subsequent to the pleadings being drawn. In my opinion the verdict is right.

Rule discharged.

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TAMM, Widow, and Another, v. WILLIAMS and Another (a).

Friday,  
4th July.

THIS was an action for goods sold and delivered, and the declaration contained the common counts. The defendants, as to all but £79 0s. 9d., pleaded the general issue; and as to £79 0s. 9d., they pleaded the custom of foreign attachment in *London*, which was set out as follows:

In a plea of foreign attachment it must be stated that the garnishee resided within the jurisdiction of the mayor's court.

That if any person be or hath been indebted to any other person, within the said city, in any sum of money, and for recovery thereof such person affirm or hath affirmed a bill in original in debt in the court, &c. (setting out the bill); and if the sergeant-at-mace return that such defendant in the bill original hath or had nothing within the liberties of the said city by which or whereby he can be summoned, nor is nor was to be found within the same city; and such defendant at that court being solemnly called doth not appear, or hath not appeared, but makes or hath made default; and in the same court it be or hath been testified or notified to the same court by the plaintiffs in the said original bill that any other person (b) be or hath been indebted to any such defendant, in any sum of money amounting to the sum of the debt in such bill of original specified, or any part thereof; then, at the petition of the said plaintiff, it is commanded to attach the defendant by such sum of money; and if the sergeant return him to be attached, and if the defendant at four courts make default, it is usual for the Court to command a sergeant-at-mace

Query, Whether it is necessary to aver that the defendant below had notice, and that the plaintiff above was indebted to the plaintiff below.

(a) *S. C. 2 Chitty Rep.* 438; (b) Amendment: "Within but without the second argument. the said city."

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to warn such other person, according to the custom of the said city, to be and appear, &c. to show if any thing he hath or knows of to say for himself why such plaintiff in such bill original named ought not to have execution of such sum so attached as aforesaid: and if the serjeant return such other person to be warned, and if such person make default, it hath been used and accustomed to award, and for such plaintiff to have execution, &c. by sufficient pledges to be found and given by such plaintiff, &c. to restore to such defendant such sum of money so attached, if such defendant within a year and a day from thence next ensuing come, or hath come, into the said court so holden as aforesaid, and disproves, or hath disproved or avoided, the said debt, &c.; and that after such pledges found and execution had, such other person hath been discharged against such defendant of the said sum so attached, and such defendant discharged against such plaintiff of such money of his debt in such bill original demanded by such plaintiff so long as such judgment and execution remain in force and effect; and if such sum does not amount to the whole sum demanded by the plaintiff's bill, such plaintiff hath been used to pray process for the residue of his said debt. [It was not stated to be usual for the plaintiff to make oath of his debt before execution awarded.] The plea then averred, that the customs of *London* were confirmed by statute 7 Ric. II.; that *Thomas Garner* and *Joseph Ashmore*, of *London*, merchants, affirmed a bill original against the plaintiffs for £600, and stated such proceedings to have been had as are above described, particularly that the Court ordered the plaintiffs to be attached by the £79 0s. 9d. due to them by the defendants, and the serjeant-at-mace returned them attached by the said £79 0s. 9d. in the hands and custody of the said defendants (c), and the command to warn the defendants, and the serjeant's return that they were warned (d). The plea then stated the pledges found and execution, and averred the judgment and execution to remain in full force.

The defendants were nowhere described of, nor averred to be in, the city.

The plaintiffs demurred to this plea, and assigned for

(c) Amendment: "Within the said city."

(d) Amendment: "The said B. and T., who were then within the said city."

cause that it amounted to the general issue. Joinder in demurrer.

In *T. 22 Geo. 3*, the case was argued by *Dayrel* for the plaintiffs, and by *Davenport* for the defendants.

*Dayrel*, for the plaintiffs.—The plea is bad, first, because it does not state that the party had notice of the summons, and without notice there can be no default. In *Fisher v. Lane* (e) it was held that the defence was not good where no notice had been given to the original defendant, the Court observing, that there could be no default, the original defendant never having been summoned, or having had notice, which was contrary to the principles of justice. If notice were not necessary to the debtor, there might be collusion between the plaintiff and the garnishee; and as a year only is given to impeach the judgment, the defendant after that period would be remediless. 2. The plea is bad in not stating that the party was within the jurisdiction. 1 *Roll. Ab.* 554; *Customs de London* (K) 3; *Lutw.* 977; 979, 984; *Latch*, 208; *Godbolt*, 400; *Bohun, Priv. Lond.* 213, 214. He also cited a case of *Still v. Amsinck*, tried at the sittings after last *Hilary Term* before Lord MANSFIELD. [Lord MANSFIELD.—The very essence of the custom is, that the defendant shall not have notice; because it is a proceeding against an absent man, who cannot be found, and has nothing to be summoned by. It is a proceeding *in rem*, like confiscations in the *Exchequer*.]

*Davenport, contra*.—The special cause of demurrer assigned is, that the plea amounts to the general issue; and no notice was given that it was the plaintiff's intention to attack the custom. The custom, as stated, is good. It is very convenient in a trading city, like *London*, that the debtor, by withdrawing out of the limits of the jurisdiction, should

(e) *C. B.*, *T.* 12 *G.* 2, 3 *Wils.* 297, 2 *W. Bl.* 834, *S. C.* From the latter report it appears that the Court held the defence ill, "there being no summons of the defendant *Fisher*, nor any return of *nihil*." "The report of the same case, in 2 *Blackstone*," says BEST, *C. J.*, "shows that the Court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a summons with a return of *nihil*; that is, such a summons as I have mentioned, viz. one that shows that the debtor is not within the city, and has nothing there by the seizing of which he may be compelled to appear." *Douglas v. Forrest*, *C. B.*, *E.* 9 *G.* 4, 4 *Bingh.* 701. See also *M<sup>c</sup>Daniel v. Hughes*, *B. R.*, *H.* 43 *G.* 3, 3 *East*, 372, 1 *Saund.* 67 a (n), 5th ed.

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not be able to defraud his creditor of a remedy against his property by leaving it in the hands of a third person. It is sufficient to bring the case within the custom, if the debtor has property within the city. Besides, a year and a day are given to the defendant to appear and put in bail; and if he does so the attachment is at an end. With regard to the supposed case of collusion between the original plaintiff and the garnishee, the debtor is not prejudiced; for if there was no debt he may come in and prove that fact. The plaintiff might have replied collusion. [*Per Cur.*—What do you say to the objection that it is not alleged in the plea that the garnishee was within the jurisdiction?] The answer is, that if the garnishee and the money were not in the city the attachment is nugatory. There is a return that the money was in the city. [BULLER, J.—The custom is an entire thing; and if it is wrong laid, you must fail. Could you maintain a custom all over *England*? It is a slip.]

*Davenport* said, that if the Court should be of that opinion, he should move to amend, by adding that the garnishee was within the city.

LORD MANSFIELD.—The money due follows the person of the debtor; therefore the garnishee must be within the city.

*Davenport* (and BULLER, J., assented).—The custom goes to goods in the city, though the garnishee be elsewhere.

LORD MANSFIELD agreed, and said that was the distinction between goods and a debt owing.

The case stood over for *Davenport* to consider whether he would amend; and the plea having been amended by inserting the words, “within the said city” (*f*), the case came on again to be argued in this term by *Dayrel* for the plaintiffs, and by *Chambre* and *Davenport* for the defendants.

*Dayrel* recapitulated the arguments urged by him when the case was last before the Court, and relied upon the want of the allegation of notice, and that the party was indebted.

*Chambre* and *Davenport*, *contra*.—The demurrer h. admitted the custom to be as stated, and the only questio

(*f*) See the amendments in the notes.

is, whether that custom is legal, and has been pursued. This custom of foreign attachment has been much discussed, and is best described in the *Year Book*, 22 *Edw.* 4, 30*b*, as certified by *Starkey*, recorder of *London*, "that if a plaint be affirmed in *London* before, &c. against any person, and it be returned *nihil*, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other; and if he comes, and does not deny the debt, it shall be attached in his hands; and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt, and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other after execution sued out by the plaintiff." No plea following the form of the custom, as here stated, has ever been held bad. The course with regard to notice to the party is particularly pointed out. There is a summons against the party; and on *nihil* returned there is process against the garnishee. In *Fisher v. Lane* the general issue only was pleaded, and the evidence was only minutes taken by the officer of the city court, which were defective. The report of that case in *Wilson* is very loose as to the arguments and facts on which the Court went. But in the report in *Blackstone* the reasons given are, because there was no summons of the defendant *Fisher*, nor any return of *nihil*, nor any information to the Court of the money being in the hands of the garnishee. All these circumstances are averred here. It is not singular that this form of notice should be sufficient. In a *scire facias* two *nihil*s are held equivalent to a *scire feci*. The party has a year to come in, and may, by giving bail, set aside the whole proceeding. With regard to pursuing the custom, as stated, the case in *Latch* does not prove any thing; it was adjourned: but it was there stated, that the debt must be sworn to; and that was not averred, which may have been a ground for the opinion the Court inclined to. According to the custom, as stated in the *Year Book*, it is sufficient if the plaintiff claims a debt. In *Paramore v. Pain* (g) the plaintiff in

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(g) *B. R.*, *H.* 40 *Ehz.*, *Cro. Eliz.* 598. See 3 *East*, 379.

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the city was also the garnishee (*h*), so that an averment of the debt was proper there, because it was in the knowledge of the garnishee, which in general it is not. For the same reason the debt might be traversed there, though in general not traversable. [BULLER, *J.*—We must take the custom as stated, and you must bring yourself within that custom. Now it is stated that it must be on a debt due, and you have not alleged that there is a debt. Your argument is, that it is not necessary by the custom, as stated in the *Year Book*, but it is necessary by the custom laid.] If the debt must be averred it may be traversed, and that would be trying the cause.

BULLER, *Justice*.—We must take the custom as stated; and the question is, whether you have brought yourself within that custom. The averments must all be proved, and the debt may be proved by the same evidence by which the plaintiff in the original action proved it: he may be called on to prove it.

Lord MANSFIELD.—There is no difficulty at all. The original plaintiff is bound to support it; and if he does not, the garnishee will recover the money from him.

*Chambre* then asked for leave to amend, which, with some difficulty, the Court granted.

The amendment was, by striking out the special plea, and pleading the general issue to the whole (*i*).

(*h*) See *Nonell v. Hullett*, *B. R.*, *T.* 2 *G.* 4, 4 *B. & A.* 646.

(*i*) But in *M'Daniel v. Hughes*, *B. R.*, *H.* 43 *G.* 3, 3 *East*, 367, it was held that it was not necessary for the garnishee to prove the debt of

the plaintiff below who attached the money in his hands. See also *Harrington v. Macmorris*, *C. B.*, *M.* 54 *G.* 3, 5 *Taunt.* 228; *Banks v. Self*, *C. B.*, *T.* 54 *G.* 3, 5 *Taunt.* 234 (*n*), 1 *Saund.* 67 *a* (*n*).

Friday,  
4th July.

A recovery in replevin is a bar to an action for an excessive distress.

#### PHILLIPS v. BERRYMAN (*a*).

THIS was an action on the statute of *Marlbridge* for taking an excessive distress. The declaration stated, that by a certain statute, &c. it was enacted that distresses should

(*a*) *S. C.* cited 1 *Schw. N. P.* 655, 4th edit.

be reasonable, and not too large, and that they who should take great and unreasonable distresses should be grievously amerced for the same excess of such distresses, as in and by the said statute, &c.; yet the said *John*, not regarding, &c. on, &c. the goods, &c. of the value, &c. at, &c. did unreasonably and excessively distrain and take as a distress, although at the time, &c. the said *John* well knew that a small part, viz. one fourth part of the said goods, would have been a sufficient distress for the said sum and all the costs and charges, &c.; and although the said goods, &c. were at the time, &c. of such different and distinct qualities that the said *John* might have distrained on part thereof without distraining the whole, viz. at, &c. whereof the said *John* had notice, contrary to the form, &c.

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The defendant pleaded, 1. Not guilty; 2. That heretofore (*T. 22 G. 3, B. R.*) the said *William* impleaded the said *John* in a certain plea of taking and unjustly detaining the goods and chattels of the said *William* against sureties and pledges, &c. complaining that the said *John*, on, &c. at, &c. took the goods and chattels following of him the said *William*, and unjustly detained them against sureties and pledges, &c.; that the said *John* defended the wrong and injury when, &c. and said nothing in bar, &c.; that the said *William*, by the judgment of the said Court, recovered £15 for his damages and costs, which judgment is still in force; that the said *William* and the plaintiff in the former suit is the same person, and that the said *John* and the defendant in the former suit is the same person; and that the said goods and chattels and the said taking and unjustly detaining in the former suit, and the said goods and chattels distraining and taking in the present suit, are the same identical goods and chattels taking, distraining, and detaining, and not different. To this plea the plaintiff demurred generally.

*Hotham*, for the plaintiff.—The question is, whether a recovery in replevin is a bar to an action for taking an excessive distress, under the statute of *Marlbridge*. The object of the two actions is different, and the damages in the one are given for a different cause from the damages in the other. At common law no action lay for an excessive distress, and the party might have taken a distress of greater value than the rent, so as to make it more eligible for the

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tenant to redeem the goods by payment of the rent. *Lynne v. Moody (b)*. Trespass would not lie, because the entry was lawful. The statute of *Marlbridge* prohibited excessive distresses, but did not give any specific remedy. Still the remedy must be upon the statute. In replevin the plaintiff declares for the unjust taking and detention, and not for the excess. Evidence of the excess would be nugatory in that action. It will be said that the taking is averred to be the same, and that that fact is admitted by the demurrer; but a demurrer only admits what is well pleaded, and possible. Here the taking was in one case lawful, in the other unlawful.

*Davenport, contra.*—Although the statute of *Marlbridge* provides that the party shall be grievously amerced for his excessive distress, it does not follow that there was no remedy at common law. There has only been one injury, viz. the taking of the goods, and for that injury the plaintiff has elected to pursue his remedy by an action of replevin, in which he has recovered damages for the taking. He cannot separate one injury, and bring separate actions for different parts of it. [BULLER, J.—If it should appear on the trial of this action that there was no cause of distress, would not the plaintiff be nonsuited?] It is only where there is a just cause of taking that this action will lie, because it was only in that case that a remedy was required. An excessive distress, without cause, was completely remedied at common law by replevin or trespass.

LORD MANSFIELD.—Without doubt the plea is good. The plaintiff has already recovered his goods, and damages for the taking and detaining of them. In that action he has treated the taking as wholly tortious; and he shall not now be permitted to say that it was rightful in part.

WILLES, *Justice*, of the same opinion.

BULLER, *Justice*.—The statute of *Marlbridge* meant to give a remedy where there was none before, and on this ground the plea is good, for it shows that the plaintiff has already had his remedy. It is attempted to be argued that the taking is not the same, but, in fact, it appears sufficiently that it was the same. A recovery in one personal action is a bar to all other personal actions upon the same subject-

(b) *B. R., M. 3 G. 2, 2 Str. 851.*

matter. *Hitchin v. Campbell* (c). There must be  
Judgment for the defendant (d).

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(c) *C. B., T. 11 G. 3, 2* (d) See *Hunt's Gilbert*, p.  
*Blackst.* 779; 3 *Wils.* 304. 68; *Bradby on Distresses*, 276, BERRYMAN.  
*S. C.* 1st edit.

THE KING v. THE INHABITANTS OF GRINDON UNDER-  
WOOD.

Monday,  
7th July.

(*Reported, Caldecott, 359.*)

PHILPOT v. MULLER, and Another.

Tuesday,  
8th July.

(*Reported ante, vol. i. p. 169.*)

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE

TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

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1783.

TURTLE v. LADY WORSLEY.

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Saturday,  
8th November.

Declaration for goods sold and delivered. Plea. Coverture of the defendant in abatement. Replication, that at the time of the making of the promises defendant was living separate and apart from her husband in adultery, and that she made the promises on her own credit, and for her own necessary use, &c. Demurrer. Held that the plea was bad in abatement, as not giving a better writ.

**T**HIS was an action of assumpsit for goods sold and delivered, to which the defendant pleaded her coverture in abatement. Replication, that the defendant, long before she made the said promises, &c., and before the exhibiting of the said bill, viz. on the 19th *November*, 1781, voluntarily and of her own accord did elope from and absent herself from the said *Sir R. Worsley*, her said husband, and continually from that time, and at the time of making the said promises, &c., and of exhibiting the said bill, hitherto did and still doth absent herself, and lives separate and apart in adultery from her said husband, and hath not been nor is yet reconciled to her said husband; and that whilst the said defendant so absented herself, and lived separate and apart in adultery from her said husband as aforesaid, she the said defendant made the said several promises aforesaid, on her own credit and for her own necessary use and account, solely and separately, in the manner of a feme sole, and not upon or for the use, credit, or account of her said husband—which plaintiff is ready to verify, &c. To this replication the defendant demurred, and the plaintiff joined in demurrer.

*Bower* for the demurrer.—The plaintiff knew that he was contracting with a married woman, and the question is, whether she, by living in adultery, acquired the power of making contracts to bind herself. It is settled that the husband is not liable upon the contracts of the wife entered into by her while living in adultery; but it does not follow from thence that she is herself liable. It cannot be maintained that a wife shall be held liable under these circumstances, unless she is also made capable of acquiring property. She may expect a fortune to be left to her, and may endeavour in this manner to secure it—this would tend to encourage adultery. The case of *Rinstead v. Lady Lanesborough* (a) turned upon particular circumstances, all of which were essential, and none of them occur here. The husband may be at any time reconciled to his wife; he may sue the adulterer for keeping her from him. This is not one of those excepted cases in which, at common law, a feme covert may sue or be sued alone. The language of BLACKSTONE, J. in *Hatchett v. Baddeley* (b), is strongly in favour of the defendant. But it will be asked, is the wife to starve? The answer is, that as soon as she returns she is entitled to alimony. [Lord MANSFIELD.—That is not so, she never is entitled to alimony after adultery. The husband may be reconciled, but he never can be compelled to allow her any thing; she can only have alimony pending the suit (c)]. It will follow at least, that if she can contract she must have property. [Lord MANSFIELD.—Not at all, the husband is entitled to every thing that comes to her.] The question whether the husband ought not to have been joined for conformity is still open, *Lean v. Schutz* (d). [Lord MANSFIELD.—The truth is, that in that case the Court were greatly divided in opinion on the general question, and rode off on the point of conformity.]

*Wood, contra.*—The wife has forfeited the protection of her husband, and her right to dower and to alimony. The husband is not liable, and therefore need not be joined. *Morris v. Marten* (e), *Child v. Hardyman* (f), 2 *Inst.* 435.

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|-------------------------------------------|----------------------------------|
| (a) <i>Ante</i> , p. 197.                 | (d) C. B. E. 18 G. 3, 2          |
| (b) C. B. E. 16 G. 3, 2 <i>Black.</i>     | <i>Black.</i> 1195.              |
| 1082.                                     | (e) <i>Coram Raymond</i> , C. J. |
| (c) See <i>Ayl. Par.</i> 58. <i>Burr.</i> | 1 <i>Str.</i> 647.               |
| <i>Eccl. Law. Marriage</i> , XII.         | (f) <i>Coram Raymond</i> , C. J. |
| 3 <i>Black. Com.</i> 94, 95.              | 2 <i>Str.</i> 875.               |

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If the husband is not liable, what is the remedy of the creditor, and is not the wife to be allowed to supply herself with necessaries? This does not resemble the case of *Hatchett v. Baddeley*, for here it is averred that the wife was living apart in adultery, and was not reconciled. In that case too, the action was not for necessaries. *Lean v. Schutz* was a case of separate maintenance; which was also one of the grounds in *Ringstead v. Lady Lanesborough*.

BULLER, *Justice*.—Is there any case where a man is joined for conformity, against whom no judgment can be given?

LORD MANSFIELD.—This is a new case, and of very extensive consequence. All the cases where it has been held that the husband is not liable, proceed on the supposition that the wife is not entitled to alimony, because alimony may be more but cannot be less than necessaries. If the husband were liable for alimony, the creditor would certainly stand in the place of the wife. Let the case stand for further argument by civilians.

On this day LORD MANSFIELD said—This case stands to be argued on Tuesday by civilians; but there is no point to argue, for the plea being in abatement is bad.

BULLER, *Justice*.—Coverture is sometimes a plea in abatement, but it is in all cases subject to the general rule, that a plea in abatement must give a better writ. It is proper when a married woman is sued for a debt contracted while sole. It is giving notice that she is now married, and that her husband must be sued with her. That gives a better writ. It would be proper in this case, on the plea alone; but it appears by the replication, the facts of which are admitted on demurrer, that she was married at the time of the promise made, but separated from her husband, and living in adultery. The husband therefore cannot be sued; and it appears upon this record, that the plaintiff cannot have any better writ; and consequently the plea amounts to the general issue, and there must be judgment of

*Respondeas ouster.*

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SINGLETON v. BOLTON.

**THOMAS SINGLETON**, the plaintiff's father, sold a medicine called "Dr. Johnson's yellow ointment." The plaintiff, after his father's death, continued to sell the medicine, marked in the same way. The defendant also sold the medicine, with the same mark, and for that injury the present action was brought. It was tried before Lord MANSFIELD, when the plaintiff was nonsuited. A rule having been obtained for a new trial,

Lord MANSFIELD said, that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie (a). But here both the plaintiff and defendant use the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could be maintained was that of property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration.

Rule discharged.

(a) Thus where a manufacturer adopted a particular mark for his goods, in order to denote that they were manufactured by him, it was held that an action on the case was maintainable by him against another person who adopted the same mark for

the purpose of denoting that his goods were manufactured by the plaintiff, and who sold the goods so marked as and for goods manufactured by the plaintiff. *Sykes v. Sykes*, B. R., M. 5 G. 4, 3 B. & C. 541; 5 D. & R. 292. S. C.

Thursday,  
13th November.

The plaintiff's father prepared and sold a medicine called "Dr. Johnson's yellow ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name and mark. Held that no action could be maintained against him by the plaintiff.

ELLIS v. GALINDO,

(Reported ante, vol. i. p. 250, (note + 71.)

Thursday,  
13th November.

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Friday,  
14th November.

Devise to *S. N.* for life; remainder to trustees, &c.; remainder to the first and other sons of the body of *S. N.*, and the heirs-male of their respective bodies; and for default of such issue, to all and every the daughters of *S. N.*, begotten or to be begotten; and for default of such issue, to the right heirs of *T. N.* for ever. Held that the daughters of *S. N.* took life estates only.

DENN dem. BRIDDON and Another v. PAGE (a).

THIS was an ejectment tried at Derby, where a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

*Mary Trollope*, being seised in fee of the premises in question in 1734, devised as follows: "As touching the rest of my temporal estate, I give and devise all my mesuages, lands, tenements, and hereditaments, at Whitwell and elsewhere, to *John Toplis* and his heirs, upon the trusts following: To the use of *Thomas Nash*, and *Mary* his wife, for 99 years, if they or either of them shall so long live: remainder to *Samuel Nash*, son of the said *Thomas Nash*, for life: remainder to the trustee, to preserve contingent remainders: remainder to the use of the first son of the body of the said *Samuel Nash*, and of the heirs male of the body of such first son; and for default of such issue, to the use of the second, and every other son and sons of the body of the said *Samuel Nash*, severally and successively, and in remainder, one after another, and as they shall be in seniority of age and priority of birth, and of the several and respective heirs-male of the body and bodies of all and every such son and sons, and the heirs-male of his and their body and bodies, lawfully issuing; and for default of such issue, to the use of the second, and every other son and sons of the body of the said *Thomas Nash*, upon the body of the said *Mary* his wife, begotten or to be begotten, severally and successively; and in remainder, one after another, as they shall be in seniority of age and priority of birth; and of the several and respective heirs-male of the body and bodies of all and every such son and sons, and the heirs-male of his and their bodies, lawfully issuing; and for default of such issue, to the use of all and every the daughter and daughters of the body of the said *Thomas Nash*, on the body of the said *Mary* his wife, begotten or to be begotten; and for default of such issue, to the right heirs of the said *Thomas Nash* for ever." The testatrix, amongst other legacies, gave

(a) *S. C.* 41 *East*, 603 (n), from the MSS. of *BULLER, J.* 1 *B. & P.* 261 (n).

£50 each to *Mary* and *Jane*, the daughters of the said *Thomas Nash*. On the death of the testatrix, *Thomas* and *Mary Nash* entered, and were possessed of the premises during their lives, and died leaving issue *Samuel*, *Mary*, and *Jane*. On the death of *Thomas* and *Mary Nash*, *Samuel Nash* entered. *Mary Nash*, the daughter, died in 1762, leaving issue several sons and daughters. In 1766, *Samuel Nash* died, leaving issue only a daughter, *Mary*, one of the lessors of the plaintiff. On his death, *Jane*, the surviving daughter of *Thomas Nash*, entered on the premises, and afterwards suffered a recovery, and sold to the defendant *Page*. *Jane Nash* died in 1782, and on her death the lessor of the plaintiff *Mary*, who is the heir-at-law of *Thomas Nash*, claimed the estate.

The question for the opinion of the Court was, whether *Jane Nash* took an estate for life or in tail.

*Balguy*, for the plaintiff.—The defendant claims under the limitation to all and every the daughter and daughters of the body of *Thomas Nash*, on the body of *Mary* his wife, begotten or to be begotten, and for default of such issue, to the right heirs of *Thomas Nash*. The question is, whether under this limitation the daughters took an estate for life or an estate tail by implication. This is a question of intention. The words “as touching the rest of my temporal estate,” do not show that the testatrix intended more than an estate for life. *Right dem. Mitchell v. Sidebotham* (b). In that case it is laid down, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. In order to discover the intent of the testator in using the words “in default of such issue,” it is necessary to examine in what sense they are used in other parts of the will. Now, in the prior limitation to the sons of *Thomas Nash*, the words “in default of such issue” mean such sons, and the same construction must be put upon the same words when they follow the limitation to the daughters. They therefore mean “for want of daughters.” An express estate cannot be destroyed by implication. *Bamfield v. Popham* (c), *Barry v. Edgeworth* (d). But it will be said that an estate tail must be implied in order to

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(b) *B. R.*, T. 21 G. 3, ante, (d) *Canc.* 1724, 2 *P. Wms.*  
vol. ii. p. 759. 523.  
(c) *Canc.* 1702, 1 *P. Wms.* 54.

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effectuate the intention of the testatrix, for which *Robinson v. Robinson* (e) is an authority. No such intention, however, can be collected from this will, which is evidently drawn by a conveyancer, and is technical throughout. Where language which has acquired a definite meaning in the law is used, the Court will not presume an intention contrary to the words. The testatrix might well mean to prefer her right heir, whom she must know, to the daughters of *Thomas Nash*. Supposing an estate tail implied, what is it to be? If general, then it is larger than the estate given to the sons, and there are no words to confine it. The words of the will are plain, and at the utmost the intention is only doubtful.

*Hill, Sergeant, contra.*—This is a question of intention, and upon the whole of the will it clearly appears to have been the intention of the testatrix to give to the daughters a greater estate than for life, viz. an estate in tail general. The words “for default of such issue,” following the limitation to the sons, mean for default of the issue male of the sons at any period, however remote; and in the same manner the words “for default of such issue,” after the limitation to the daughters, mean in default of the issue of the daughters. There are other circumstances of probability to show the intention of the testatrix. The devise is to daughters begotten, or to be begotten. Daughters might be born after, and then the remainder over to the right heirs could not take place, if the after born daughters took only an estate for life. Words of limitation have been frequently supplied. *Wyld v. Lewis* (f), *Evans v. Astley* (g), *Power v. Campbell*, T. 1773, on error from Ireland. [Lord MANSFIELD.—You may take it for granted, without citing cases, that manifest intention will supply words of limitation.]

*Balguy*, in reply.—There is no dispute as to principles; the only question is, what was the plain and evident intention of the testatrix? As to the construction of the words “such issue,” *Bamfield v. Popham* is a decisive authority. They are words of reference, and mean such issue as are before mentioned. In the preceding limitations they mean “for default of son or sons.” [Lord MANSFIELD.—They mean for

(e) *B. R.*, M. 30 G. 2, 1 *Burr.* (g) *B. R.*, M. 5 G. 3, 3 *Burr.*  
 38. 1570.

(f) *Canc.* 1 *Atk.* 432.

default of all those limitations.] The words cannot enlarge the interest given under any of the limitations. They are only co-relative and co-extensive with that interest. So when they follow the limitation to the daughters, which is clearly only an interest for life, they cannot enlarge that interest into an estate tail. The estates to the sons are in tail male, and what is there to show that the testatrix intended to prefer the son of a daughter, or the daughter of a daughter, to the daughter of a son? She might mean a personal bounty to the daughters, for they have legacies given them. By holding this an estate for life, the limitation over will not be defeated, for it is no more than a reversion, the heir of *T. Nash* being the heir of the testatrix (*h*).

LORD MANSFIELD.—This is a question which does not admit of argument, nor of a case to be cited. The rules of law are clear. In the construction of deeds, a grant without words of limitation enures for life only; and when questions as to wills first came into Courts of Common Law, the judges followed the rule as to deeds, and not the rule of the Civil Law as to bequests (*i*). I have frequently said, that, in almost all cases, the Court, in holding it a life estate, defeats the intention of the testator, because common persons do not advert to the difference between lands and chattels. The Court, therefore, is astute in finding out circumstances of intent from which a limitation may be implied, and takes advantage of such circumstances with pleasure. The question, then, always is, whether there is enough on the face of the will to imply a limitation; for we cannot go into conjecture. I do indeed conjecture, that a further limitation was intended, but I do not know what. Is there then any power to supply a limitation omitted? It is unfortunate, but there is no remedy. Had the words been, “and if they die without issue,” it might have been a ground to imply an estate tail. But here you must strike out the word *such*. Then what are the circumstances of intention? I cannot say that the testatrix meant to prefer the issue of daughters. How are we to supply the de-

(*h*) The fact that the lessor of the plaintiff was heir at law to the testatrix was taken for granted, both in the argument and in the judgment, though it did not appear in the case.

(*i*) See *Hogan v. Jackson, B. R., T. 15 G. 3, Cowp. 305.*

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ficiency? With a general or a special limitation? There is no light to go by.

BULLER, *Justice*.—It seldom happens that in the case of wills, the decision in one instance is found applicable in another. Here *Right v. Sidebotham* has no application. There is, however, one case which has been overlooked, but which is strongly in point, *Price v. Warren* (k), which went to the *House of Lords*. That case was stronger than the present. Here there is nothing in the will to show such an intention as ought to disinherit the heir at law.

*Postea* to the plaintiff (l).

(k) *Skinner*, 266.

(l) See *Hay v. Coventry*, B. R., H. 29 G. 3, 3 T. R. 83; *Foster v. Lord Romney*, B. R., M. 50 G. 3, 11 East, 594; *Doe dem. Liversage v. Vaughan*, B. R., H. 2 & 3 G. 4, 5 B. & A. 464, 1 D. & R. 52, S. C.; *Doe*

dem. *Tooley v. Gunniss*, C. B., E. 52 G. 3, 4 Taunt. 313; *Doe dem. Pinnock v. Dickson*, post. See also *Hayes's Principles for expounding dispositions of real estate to ancestor and heirs in tail*, &c. p. 32.

Tuesday,  
11th November.

In declaring against the indorser of a foreign bill of exchange, the omission of the averment of protest is only matter of form, and cannot be taken advantage of under a general demurrer.

SALOMONS v. STAVELY (a).

THIS was an action on a foreign bill of exchange against the indorser. The declaration stated that the defendant "had refused to accept or pay the same, of all which premises the said defendant afterwards, and with all convenient speed, to wit, on, &c. had notice." To this declaration the defendant demurred generally.

*Bower*, for the demurrer.—The declaration is bad, in omitting the allegation of a protest. This being a foreign bill of exchange, the protest is part of the custom. The bill being drawn from *England* on a person in *Bengal* is a foreign bill. An inland bill is where both parties reside here. That is the definition given in *Bacon's Abridgment* (b). The indorser of a bill is exactly in the situation of a new drawer; and in *Brough v. Perkins* (c), it is said by *HOLT, C. J.*, that, in the case of a foreign bill,

(a) *Note of S. C. ante*, vol. ii. p. 683, note †, 144.  
(b) Vol. iii. p. 603.

(c) *B. R., M. 2 Ann. 6 Mod. 80*, 1 *Salk.* 131, 2 *Ld. Raym.* 992. S. C.

no one can resort to the drawer for non-acceptance or non-payment, without a protest. The necessity of a protest appears also from *Molloy* (d). It will be said that protest is only notice. The answer is that the only legal notice in case of foreign bills is a protest. In this case, one set of bills was sent to the *West Indies*, and the defendant could not recover them for want of a protest.

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*Morgan, contra.*—It is not necessary to deny that this is a foreign bill, or that in the case of a foreign bill, a protest is necessary; but this mode of declaring cannot be taken advantage of on general demurrer. In the old entries the custom with regard to bills of exchange is variously stated, but in several cases it was held that the custom need not be stated which introduced the present general way of declaring. *Mogadara v. Holt* (e). Now the protest is part of the custom, and as such need not be alleged. The want of the protest may be taken advantage of under the general issue. There are two precedents in the books where no protest is averred, *Lilly, Ent. 55* (f), *Brown's Vade Mecum*, 27, *Prec. 30*, though the latter appears to be the case of an inland bill.

*Bower*, in reply, contended, that the title being defectively set out, the defendant might take advantage of it on demurrer without the expense of a trial.

• Lord MANSFIELD.—There is no doubt but this is a foreign bill, and that a protest and notice of the protest are necessary; but it does not follow that this declaration is bad. Notice is alleged, and protest is the only legal notice. Therefore, on the trial, a protest must be proved.

BULLER, *Justice*.—The case in *Lilly's Entries* is in point. The only question is, whether the not alleging a protest in the declaration is form or substance? If form only it cannot be taken advantage of on general demurrer. The Court must have thought so in the case in *Lilly*.

Demurrer withdrawn on payment of costs, and giving judgment of the term.

(d) *De jure maritimo*, B. ii. c. 10, § 28.

(e) *B. R.*, M. 3 W. & M. 1 Show. 317.

(f) In this form (against the drawer) no notice whatever is alleged. It is therefore clearly bad.



1783.

Wednesday,  
13th November.

THE KING v. THE INHABITANTS OF CHEW MAGNA.  
(Reported, Caldecott, 865.)

Wednesday,  
12th November.

THE KING v. THE INHABITANTS OF EDON, LONGDON,  
AND STANLEY.

(Reported, Caldecott, 374.)



Saturday,  
15th November.

TONKIN v. FULLER.

Victualling bills are not assignable; but by usage, a power of attorney, to the attorney, his substitutes and assigns, to receive the money, authorises the attorney to assign. Such a power is called a *general* power, in contradistinction to a special power, which authorises the attorney only to receive. Where an attorney, acting under the latter power, deposited certain victualling bills with the defendant, as a security for money borrowed from him, in an action of trover by the payee of the bills, held that the plaintiff was entitled to recover.

THIS was an action of trover for four victualling bills. The bills in question were drawn in the usual form by the commissioners at *Plymouth*, on the treasurer of the victualling office in *London*, and were not in a course of payment when the action was brought. They began thus: "Mr. *Treasurer*, we pray you pay unto Mr. *Peter Tonkin* the sum of, &c." By the terms of the bills they were payable to *Peter Tonkin* only, and not to his order.

The cause was first tried before Lord LOUGHBOROUGH at *Guilthall*, after *Easter Term*, 1783. The plaintiff proved that the defendant had the bills in his possession. The terms in which the bills were drawn afforded *prima facie* evidence of the plaintiff's property in them. He then proved a demand and refusal. The defendant, in answer to this, contended, that the plaintiff had delivered the bills to one *Denham Briggs* (since a bankrupt), and had executed to the said *Denham Briggs* a letter of attorney, which authorised him, as it was alleged, to dispose of them as he pleased, and that *Denham Briggs*, by his agent *D. Berry*, had deposited them with the defendant as a security for a sum of money borrowed of him. In support of this defence the defendant did not produce the letter of attorney itself, but an entry of it in the pay office in the following words: "*Peter Tonkin* (of *Plymouth*), letter of attorney to *Denham Briggs*, Esq., to receive and give receipts and discharges for all sums of money due to him from the com-

missioners of the victualling." Dated 12th *December*, 1777. The plaintiff would have proved by the officers of the pay office, that this was an entry of a special letter of attorney to *receive* the contents of the bill when due, and that the entry of a general letter of attorney to *receive* and *assign* would have been different; but Lord LOUGHBOROUGH, before whom the cause was tried, declaring it to be his opinion that a letter of attorney to receive was a letter of attorney to assign, such proof became useless. Lord LOUGHBOROUGH summed up very strongly for the defendant, upon which the plaintiff submitted to be nonsuited.

In *Trinity Term* the plaintiff commenced this action in the *King's Bench*, and declared in *Middlesex*, where, being an attorney, he had a right to keep the venue. The trial came on at the sittings after *Trinity Term*. In addition to the above proofs the officers of the pay office gave the following evidence:

That victualling bills were in practice assigned by a blank assignment which accompanies the bill. That this assignment may be made either by the payee or his attorney, properly authorised to make it. That the letters of attorney which a payee may execute are of two sorts: one gives an authority to the attorney to receive and give discharges, the other gives this authority to the attorney, his *substitutes and assigns* (a printed form of each sort was then produced, in which this difference appeared). That the former, which is called a special letter of attorney, enables the attorney to receive the money when due, but gives him no power to assign; and that the pay office would not pay the contents of the bill, when due, to the assignee of such an attorney. That the latter, which is called a *general* letter of attorney, enables the attorney to assign as well as to receive. That an entry of such letters of attorney is made at the pay office. That assignments made by attorneys are usually brought to the pay office to be marked, upon which the officer examines whether there be an entry of a general letter of attorney; and if he finds one, he marks the assignment, which mark denotes that the attorney had authority to assign. That the entry above stated is an entry of a special letter of attorney to *receive* only. That a general letter of attorney is entered thus: "*A. B.*, letter of attorney to *C. D.*" [The books, which were produced, showed this

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distinction.] That the officer told the defendant who applied to him, that he would not mark an assignment made under the special letter of attorney entered as is above set forth.

Lord MANSFIELD left the case to the jury with nearly the same observations as he afterwards made in delivering his opinion on the motion for a new trial. The jury found a verdict for the plaintiff.

The defendant having moved for a new trial, *Cowper* and *Piggot* were heard for the rule, and *Wilson*, *Peckham*, and *Gibbs* against it. In support of the verdict the case of *Maclish v. Ekins* (a) was cited. The defendant's counsel would have produced at the trial, and now again insisted upon a subsequent decree of Lord HARDWICKE for staying proceedings in that cause, but as the grounds of the decree did not appear, the Court would not suffer it to be read. It was argued for the defendant, that the usage of assignment gave him a title to the bills. The plaintiff's counsel contended that the defendant had no right by the general law, and that the mode of assignment established by the usage had not been observed in the present case.

Lord MANSFIELD.—I never had any doubt on this point, but as it is a very material one, I wished it to be considered here. The question may just as well have been tried by a *Middlesex* as by a *London* jury. They had nothing to determine but the usage, and of that the evidence was all one way. The only question is, who has the property in the bill? It must be the plaintiff's, unless he has done something to entitle another. It is deposited with the defendant by one who had it under a limited power of attorney. If the plaintiff had ever consented to the disposal of the bill, he would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretence. The plaintiff and the defendant are equally innocent. As to the usage, the thing is not assignable, but by a contrivance it becomes so. A common letter of attorney does not enable the attorney to assign; *delegatus non potest delegare*. The power is revocable till the money is received. The general letter of attorney makes these bills assignable, and substitutes and assigns may receive. The letter of attorney is registered, and the assignment is marked

(a) *B. R.*, *H.* 26 G. 3, *Sayer*, 73; and see note of *S. C.*, 13 *East*, 515 (a).

at the pay-office. These facts were not disputed. Independently of the usage, this letter of attorney does not at law convey a power to assign. The defendant has taken the bill under a bad title.

BULLER, *Justice*.—It is admitted that, by the general law, the defendant has no title, but he contends that the usage gives him a right; yet that usage is against him. This has been resembled to the case of a bond deposited by an obligee in a third hand, but the cases are not similar. The obligee *has*, *Briggs* had *not*, a power to assign and dispose of the paper. This is a mere question upon the usage, which is clearly with the plaintiff, and the case of *Muchish v. Ekins* is clearly in point for him.

Rule discharged.

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DOE *dem.* THE DUKE OF NORFOLK *v.* SANDERS.

Saturday,  
15th November.

**EJECTMENT** by the lessor of the plaintiff, as lord of the manor of *Whetham*, under stat. 9 G. 1, c. 29, to recover possession on non-payment of fine. The cause was tried at the last assizes for *Sussex*, when the following case was reserved for the opinion of the Court:

The lessor of the plaintiff is lord of the manor of *Whetham*, and the premises in question were held of the same manor by copy of Court-roll to *Robert Sanders* and his heirs. By the custom of the manor, the widows of tenants in fee are entitled to their free-bench, on the payment of one penny to the lord. The copyhold tenants in fee have been accustomed to settle their estates in strict settlement and in tail, but no instance has existed in which the widow of a tenant in tail has survived her husband, except the present defendant.

The said *Robert Sanders* having first surrendered to the use of his will, devised the premises to his nephew *Robert Sanders*, and to his heirs and assigns for ever; and in default of issue of the body of the said *Robert Sanders*, to *Joseph Sanders* and his heirs for ever. *Robert Sanders*, the devisee, was admitted and died seised, leaving the defendant his widow, and two daughters. The defendant tendered one penny, and prayed to be admitted to her free-bench. The

The widow of tenant in tail of copyhold is entitled to her free-bench, though there is no custom as to the free-bench of widows of tenants in tail, but only as to the free-bench of widows of tenants in fee.

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lord admitted the eldest daughter as customary heir (a), and having assessed a fine, now brought this ejectment under the statute 9 G. 1, c. 29. Notice of this assessment and fine was served accordingly.

The question for the opinion of the Court was, whether the defendant, as widow of *Robert Sanders*, the devisee, was entitled to her free-bench.

Steele, for the plaintiff.—The question is, whether on the custom stated, the widow of tenant in tail is entitled to her free-bench. Some confusion exists in the books as to estates tail in copyholds, and as to the operation of the statute *de donis*; but it is clear that by custom an estate tail may be created in a copyhold. *Co. Litt.* 57, *b. Brown's case (b)*. Without custom, the widow of a copyholder is not entitled to free-bench or dower; and although it appears from the case that, by the custom of this manor, the widows of tenants in fee are entitled to their free-bench, yet it is not stated that the custom extends to the widows of tenants in tail. If estates tail are to be held subject to free-bench in this manor without a special custom, why not also estates for life? Copyhold customs being in derogation of the law of the land, shall be construed strictly. Thus where the custom was, that if any man married any customary tenant of the manor, and had issue, and outlived his wife, he should be tenant by the courtesy, it was held not to extend to the case of the copyhold descending upon the wife during coverture, but that she must be a customary tenant at the time of the marriage. *Sir John Savage's case (c)*.

Rous, contra.—It is not disputed that no copyhold estate can exist contrary to the custom of the manor. The case states a grant to *Robert Sanders* and his heirs in fee of the copyhold, and that the widows of tenants in fee are entitled to free-bench. Free-bench is nothing more than a right of dower created by custom, and partakes of all the essential qualities of dower. It is dower, the extent of which is ascertained by custom. The attributes of estates in fee

(a) The case did not state the daughter admitted to be an infant, which was necessary to support the ejectment under the statute. But the defendant wishing to take the sense of the

Court on the merits, the objection was not made.

(b) 4 Rep. 22.

(c) *B. R., T. 29 Eliz., 2 Leon.* 109.

extend in general to estates tail, and the reason is, because the estate is the same, only subject to the restraint of alienation. Before the statute *de donis*, all estates of inheritance were in fee-simple, and there is nothing in the statute denoting the creation of a new estate. Had a new estate been created, the incidents attending an estate in fee-simple would not have attended it. There could have been neither dower nor courtesy. The difference in the descent of a fee and an estate tail is only apparent, and is rather a difference in the evidence of the title than in the descent itself. In the one case, it is the descent of a feud of indefinite antiquity, and not capable of being traced; in the other case, it is traced from the original possessor of the feud. Nor will the reversion or remainder after an estate tail be found to differ from the reversion in the lord after a fee-simple by escheat. The difference arises from the statute of *quia emptores*. If that statute had transferred the reversion as well as the holding to the chief lord, the donor would have lost his possibility. The reversion and remainder, therefore, differ only in this, that in one case they are transferred to the lord and in the other not. This doctrine is supported by the reasoning of Lord Holt, in *Machell v. Clarke* (d). When the custom is silent, as in that case, the construction must be according to the general law, and the general law is, that dower is incident to estates tail. But it is not necessary to argue upon the custom, since entails of copyhold do not exist by the custom; for the statute *de donis*, being made in 13 *Edw.* 1, and consequently within time of memory, an estate tail, in copyholds, cannot be created by custom. *Heydon's case* (e). So it is said by JENNER, J., and POPHAM, C. J., in *Gravenor v. Brook* (f), that an estate tail is wrought out of copyhold land by the equity of the statute *de donis*; for, otherwise, it cannot be that there can be any entail of copyhold land; for, by usage, it cannot be maintained, because no estate tail was known in law before this statute. It is, indeed, said by DODDRIDGE, J., in *Lee v. Brown* (g), that the custom operates with the statute in creating entails of copyholds, but this position is very difficult to be understood.

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(d) *B. R.*, T. 1 *Ann*, 2 *Lord Raym.* 778.

(e) *Scacc.*, E. 26 *Eliz.*, 3 *Rep.* 8 b.

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(f) *B. R.*, M. 35 & 36 *Eliz.*, *Poph.* 33.

(g) *B. R.*, M. 15 *Jac.* 1, *Poph.* 128.

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*Steele*, in reply.—The argument, on the other side, goes upon the analogy between estates in fee and in tail with respect to their incidents, but that analogy does not hold throughout. Thus the rule of *possessio fratris*, which governs the descent of lands in fee, does not apply to lands in tail. *Co. Litt.* 15 b (h). [Lord MANSFIELD.—There was no *possessio fratris* in a fee simple conditional before the statute.] In another incident estates tail differ from estates in fee. Tenant in tail cannot endow his wife *ad ostium Ecclesiæ*. *Litt. s.* 46. In *Erish v. Rivez* (i) it was held that there could not be an estate tail of copyhold lands without a special custom. The custom then must govern the estate, and if it does not superadd to it the incident of free-bench, the widow is not entitled.

Lord MANSFIELD.—It is now settled, no matter how, that copyholds may be entailed. The question here is merely on the custom. It has never happened that a tenant in tail of these copyholds has left a widow, and therefore there is no custom about it. But there was a custom before the statute *de donis* that the widows of tenants in fee should have free-bench. The statute does not take it away, and there are no grounds for the Court to say that tenants in tail are excepted out of the custom.

BULLER, *Justice*.—The first question is, whether the statute is to receive a very strict or a natural construction? Sir John Savage's case, in *Leonard*, is one of very strict construction, but it was denied in *Clements v. Scudamore* (k). The case in *Leonard* is not the only one to the same effect about that period. *Reeve v. Malster* (l). But adopting this highly strict construction, let us see how it applies in the present case. The custom is that the widows of tenants in fee shall have dower. In strictness, *fee* means fees of all kinds—an estate of inheritance. Besides, the custom is annexed to the estate, the lord grants a fee simple, and therefore there is no hardship upon him.

Judgment for the defendant (m).

(h) See *Doe v. Whichelo*, B. R., E. 39 G. 3, 8 T. R. 213. (l) B. R., T. 11 Car. 1; 1 Roll. Ab. 624; Sir W. Jones, 361; Cro. Car. 410. S. C.

(i) B. R., M. 41 Eliz., Cro. Eliz. 717.

(k) B. R., H. 1703, 1 P. Wms. 69.

(m) "Wherever the lord can grant in fee, he can grant to the heirs of the body. If the statute *de donis* turned estates

In fee simple conditional in copyholds into estates tail, the lord might now, without a custom, by a grant to the heirs of the body, create an estate tail. But such grant would now make a fee conditional. Mr. *Rous*'s observation that the possibility, after a fee conditional becomes a reversion, after an estate tail, by the operation of the statute of *quia emptores*, which separates the tenure from the escheat, will not account for the remainder which may be interposed between the estate tail and the donor's reversion. This seems to be a substantial

difference between estates tail and fees conditional.

"To reconcile the books one should suppose that, in certain manors, estates might by custom, before the statute, be granted to the heir of the body with remainders over. But, in fact, probably the custom of entailment was allowed, without considering that it could not be of indefinite antiquity, and that co-operation of the custom with the statute was afterwards invented to cure it. If so, the statute does not extend to copyholds." *Note by Mr. Wilson.*

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ROGERS v. BROOKS and WIFE.

(Reported, 1 T. R., 431. (n)).

Saturday,  
15th November.

ROBSON v. ROBINSON.

Tuesday,  
18th November.

CASE for injuring the plaintiff's fishery in the river *Eden*, in the county of *Cumberland*, by erecting a weir and stells, &c. across the river, below the plaintiff's fishery, which prevented the fish from passing up the river to the fishery of the plaintiff. Plea, not guilty. At the trial of the cause at *Carlisle* before BULLER, J., the plaintiff proved his title as stated in the declaration; and the defendant, who was the lessee of the corporation of *Carlisle*, to whom the fishery was worth £800 a year, tendered evidence to prove an immemorial exercise of the fishery by the corporation and their lessees in the manner complained of by the plaintiff. The plaintiff thereupon insisted that such a fishery was illegal by statute, 2 H. 6, c. 15, which prohibits weirs. The defendant contended that the act only applied to navigable rivers, and that the object of it was only to preserve the navigation, and to prevent the destruction of

*Quere*, whether a weir which does not destroy the fry of fish, nor impede navigation, and has existed from time immemorial, is illegal within the statute, 2 Hen. 6, c. 15.



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the fry, neither of which injuries was proved to have occurred in the present case. It was also objected that the action would not lie, as it was an action brought for a public nuisance. BULLER held that the statute was decisive of the question, and that it rendered the fishery claimed by the defendant illegal, and he directed a verdict for the plaintiff.

A new trial was moved for on the grounds urged at the trial; but the Court being of opinion that the action lay, the argument turned chiefly upon the effect of the statute, 2 H. 6, and other acts *in pari materia*.

Lee, S. G., Sir T. Davenport, Scott, and Wood, showed cause.

Wilson, Chambre, Arden, and Law, *contra*. They relied on *Magna Charta*, c. 2; 25 Ed. 3, c. 4; 45 Ed. 3, c. 2; 1 H. 4, c. 12; 12 Ed. 4, c. 7, and cited the case of *the Chester Mill* (a). The defendant was prepared to prove that the weir had existed from time immemorial, and therefore the claim of the plaintiff must be subject to it. The plaintiff's claim was as owner of the soil, which was *prima facie* evidence of a right to fish, but might be restrained by other rights. None of the acts, of which there are many, professedly made to protect the fisheries, prohibit such erections. The statute, 2 Hen. 6, c. 15, was made to prevent "the destruction of the brood and fry of fish, and disturbance of the common passage of vessels." The fry are not injured by this weir, nor is the passage of vessels disturbed. The river *Eden* was never navigable beyond this stell or weir, as appears from an act passed in the reign of George I. to render it navigable up to this point. If there be any doubt as to the application of the statute, the usage which has prevailed would be explanatory of it, and would govern the construction.

LORD MANSFIELD.—The opinion at *Nisi Prius* went solely on the ground of the statute. If that clearly prohibits this mode of fishing, there is no doubt that the plaintiff may maintain this action. The injury is not to all the king's subjects, but to those who have a right of fishing. As the case now comes before the Court, it must be admitted that the weir has stood from time immemorial; that it does not interrupt the navigation; that it does not destroy the spawn or fry of

(a) *E. 7 Jac. 1, 10 Rep. 137 b.*

the fish; and that it is not perpetual. The value of the fishery is great, and the long usage is material, and I am unwilling to shut up the point. It is perfectly clear that the act of Parliament cannot go into desuetude, and that the usage cannot repeal it. I do not give any opinion, but there are circumstances in the act to narrow its construction. It certainly does not mean all rivers. The erection is not prohibited, but the standing continually. I should lean very much in favour of the defendant. I think there should be a new trial, for the purpose of putting the facts into a special verdict, the defendant to admit that the plaintiff is entitled to the fishery.

BULLER, *Justice*.—I agree that there should be a new trial for the purpose mentioned. It may be a great question, if it comes to the construction of the act; but if it turn out that the defendant has not used this weir immemorially, that point will not arise. I do not think that the other acts mentioning weirs apply. They are made on other subjects. Weir does not necessarily mean any thing built across a river. Garth is an enclosure, and not the same as stell. As to the usage, I know of no authority that local usage in a particular river, however large, can be of any weight in construing a general act of Parliament.

Rule absolute (b).

(b) In *Wild v. Hornby*, B. R., H. 46 G. 3, 7 East, 199. Lord ELLENBOROUGH appears to refer to this case (in which he was counsel) in the following passage: "I remember that the stells erected in the river *Eden* by the late Lord *Lonsdale* and the corporation of *Carlisle*, whereby all the fish were stopped in their passage up the river, were pronounced in this Court upon a motion for a new trial, to be illegal and a public nuisance." In the report of the same case in 3 *Smith*, 247, his

Lordship is made to say, "At the *Eden* where the corporation of *Carlisle* and Lord *Lonsdale* have stells for the catching of fish, it was held that the keeping of them close day and night was a public nuisance; and Lord KENYON said, no man can claim an estate in a public nuisance. When BULLER, J., came to try that cause, he admitted evidence of usage, however, thinking that under certain restrictions these stells might be allowed by usage."

1783.

ROBSON  
v.  
ROBINSON.

1783.

Wednesday,  
19th November.

DOE, on the demise of DAVY and Others, v. HADDON.

In ejectment against a schoolmaster who has been removed by sentence of the trustees of the school for misbehaviour, it is not necessary for the lessors of the plaintiff to prove the grounds of the sentence, nor can the defendant disprove them.

The defendant may give in evidence the declarations of a former trustee who signed the sentence, and who is since dead, for the purpose of showing that his signature was corruptly obtained.

Where the constables of a township are (amongst others) made trustees of a school, in ejectment by the trustees against the schoolmaster, it is sufficient to show that the constable acted as such, without proving his election and swearing in.

THIS was an action of ejectment for lands in *Suffolk*, devised by a Mr. *Metcalf* for the support of a school in the parish of *Storham*. The cause was tried at *Bury* before *HOTHAM, B.*, when the following facts appeared in evidence: The premises were devised to trustees, and the election of the schoolmaster was directed to be by the rector, churchwardens, and constables, to whom also the power of amotion was given, on cause to be adjudged by them. The electors having removed the defendant, who was schoolmaster, for several causes stated in the instrument of removal, and amongst others negligence and drunkenness, filed an information in *Chancery* against him, which was dismissed without costs, the *Chancellor* being of opinion that the remedy was at law. His Lordship at the same time directed the heir of the surviving trustee to convey to new trustees, who were the lessors of the plaintiff. On the part of the defendant, evidence was given that *Davy*, one of the lessors of the plaintiff, and who had also been churchwarden at the time of the amotion had said that he would spend £500 rather than not turn out the defendant; and evidence was tendered that *Amos*, a constable, who had signed the instrument of amotion, and who was since dead, had said in his lifetime that he should not have signed the adjudication of *Davy*, had he not threatened to get him turned out of his office of constable, which was worth £2. 10s. a year. The learned Judge was of opinion that this evidence was inadmissible, and a verdict was found for the plaintiff. A rule *nisi* for a new trial having been granted on three grounds, first, that there was not sufficient evidence of notice to the defendant to attend at the meeting for his removal; secondly, that the learned Judge had not put the plaintiff on proving, and had not permitted the defendant to disprove the charges in the instrument of removal; thirdly, that no evidence was given of the election of the constables who removed, but only that they acted as such.

*Graham* and *Le Blanc* showed cause. The removal was an adjudication of persons, having competent authority, and like a conviction by a justice of the peace, or a removal by a

college or corporation, good until reversed by some legal proceeding. It might, perhaps, be questioned in *Chancery*, that Court having a general superintending power over charities, or perhaps a mandamus might lie to restore the defendant; but it cannot be brought in question before a jury in an ejectment, where it is sufficient to show a legal title.

*Partridge and Preston, contra.*—In convictions under the Excise laws, the grounds of the convictions are gone into in actions against the officers, at least it is a disputed point, and the contrary is not yet settled. [Lord MANSFIELD said, that he did not know that the merits of the conviction could be gone into, and that he rather thought not (a)]. The authority to remove in this case is given not to persons but to officers, therefore strict proof of their appointment ought to have been given, yet no proof was adduced of the election or swearing in of the constables, or at least of one of them. Evidence also was rejected of the declaration of one of the electors, who was dead, that he had signed the adjudication, by the persuasion of *Davy*, against his own opinion. This declaration was admissible, under the authority of *Doe dem. Clymer v. Littler* (b). Lastly, no notice to quit was given by the lessors of the plaintiff to the defendant, who ought to have received such notice, his title being prior to that of the present trustees. [Lord MANSFIELD.—I have no doubt upon any part of the case, except the declaration of *Amos*, which was rejected. As to that I wish to hear the counsel on the other side.]

*Graham*, in reply.—The evidence of *Amos*'s declaration was not admissible to contradict his signature. There is no instance of such declarations being allowed to be evidence. The case of *Doe dem. Clymer v. Littler* depended on very peculiar circumstances. Nothing is more dangerous than to admit such evidence. If *Amos* had been alive, he could not have contradicted his own act. But supposing the evidence admitted, it does not amount to any thing that could invalidate the adjudication, and the Court therefore will not grant a new trial.

(a) See *Terry v. Huntingdon*, *Hard.* 480; *Fuller v. Fotch*, *Carth.* 346; *Roberts v. Fortune*, *Harg. Law Tracts*, 468, (a.); *Brittain v. Kinnaird*, 1 *B. & B.*, 432; *Henshaw v. Pleasance*, 2 *W. Bl.* 1174; 1 *Phill. Ev.* 355; 7th Ed. *Stark, Ev.* p. ii. 236. (b) *B. R.*, *M.* 2 *G.* 3, 3 *Burr.* 1255.

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Lord MANSFIELD.—Several grounds have been urged in support of the rule for a new trial. The first is, that there is a defect of evidence. As to this, the Court looks into the merits of a case, and if they are not with the application, slight evidence, if the jury believed it, will be sufficient. The evidence of the notice is certainly sufficient, and so is the evidence of the appointment of constables. The defendant, on any of these grounds, should have supported his application by an affidavit of the facts. With regard to the not going into evidence of the charges, I think the learned Judge was right. The adjudication was in a domestic forum, and the merits of it cannot be entered into in an ejectment. But my doubt is upon the rejection of evidence tending to show corruption in one of the Judges. Whenever a judgment is obtained by fraud, it is open to go into it. Here is a criminal charge against one of the Judges.

WILLES, *Justice*.—I am of the same opinion as to the two first objections. The last is a nice point. If the adjudication was corrupt, it cannot stand. The Court did admit evidence to show *Davy's* malice, which was a sort of introduction to the evidence which was rejected. I incline to think, under all the circumstances, that in this case the evidence ought to have been admitted.

BULLER, *Justice*.—Corruption is admitted on all hands to vitiate, and how can it be proved, if not by the declarations of the persons guilty of it? I think there ought to be a new trial.

Rule absolute—on the defendant's undertaking to admit the plaintiff's title, the notice, &c., and to confine his defence to the single point of corruption.

The cause was again tried before WILLES, *J.*, at the Lent Assizes, 1784, and evidence was given of *Amos's* declaration, which was uncontradicted. A verdict having been again found for the plaintiff, the Court set it aside in the following term, as against evidence. A third trial was then had, before Lord LOUGHBOROUGH, at the Summer Assizes, 1784, when, on evidence of contrary declarations by *Amos*, a verdict was again found for the plaintiff (c).

(c) The principle upon which this case, so far as it respects the conclusiveness of the instrument of amotion proceeded, has been frequently recognised; see *Philip v. Bury*, *B. R.*, *T.*

6 *W. & M.*, 1 *Lord Raym.* 5 *Comb.* 265; *Holt*, 715; 1 *Show.* 360; *Skinner*, 447; 4 *Mod.* 106; 2 *T. R.* 346, *S. C. Rex v. Grundon, B. R.*, *T.* 15 *Geo.* 3; *Cowp.* 315; *Moody v. Thurston, B. R.*, *M.* 8 *Geo.* 1, 1 *Str.* 481; 1 *Phillip's Ev.* 356, 7th ed.; but where the visitors and feoffees of a school dismissed the schoolmaster for misconduct, but omitted to summon the master before them previously to such dismissal, it was held that they were not entitled to maintain an action of ejectment. *Doe dem. Earl Thanet v. Gartham, C. B.*, *M.* 4 *Geo.* 4, 1 *Bingh.*, 357.

With regard to avoiding a judgment or sentence on the ground of fraud, a distinction has been taken where the person seeking to avoid it was a party to the judgment or sentence, in which case it has been

held that he cannot allege the fraud in a collateral suit, but ought to apply to the Court or tribunal which pronounced it to vacate it. *Prudham v. Philips*, cited and recognised in *Meadows v. Duchess of Kingston, Canc.* 1775; *Ambler*, 763; *Hargrave's Law Tracts*, 456, *S. C.*, and see 2 *Evans's Po-thier*, 311.

As to the evidence of the appointment of the constable, it is said by *BULLER, J.*, in *Berryman v. Wise, B. R.*, *T.* 31 *Geo.* 3, 4 *T. R.* 366, that, in the case of all peace-officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments, and that even in case of murder; and see *Gordon's case*, 1 *Leach, C. C.* 518, 4th ed.

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KEENE, on the demise of PINNOCK and Another, v.  
DICKSON (a).

THIS was an ejectment for lands in *Warwickshire*, tried, by consent, in *Middlesex*, after last term, before Lord MANSFIELD, when a special verdict was found, which stated as follows:

*Henry Dakins*, being seised in fee of the premises in question, on the 5th of *August*, 1747, devised his real estates in *Great Britain* to his brother, *Philip Dakins*, for

and for want of such issue male, then to the use of all and every the daughter and daughters of *G. P.*; and for default of such issue, to *R. C.*, and the heirs of his body, he taking the testator's name. *G. P.* had only one son, who died without issue, and two daughters, who were the heirs-at-law of the testator. Held by Lord MANSFIELD, and *BULLER, J.*, that the words "for default of such issue male" rendered the subsequent devises contingent on there being no son of *G. P.*, and that there having been a son, who died, the devises over were void, and the daughters took (as heirs) in fee. Held by *WILLES, J.*, that the daughters took joint estates for life, and (semble) remainders in tail.

Friday,  
21st November.  
Devise to *G. P.*  
for life; re-  
mainder to  
trustees, to pre-  
serve, &c.; re-  
mainder to the  
first son of *G. P.*  
and the heirs  
of the body of  
such first son;  
remainder to  
the other sons  
in like manner;

(a) *S. C.*, cited 3 *T. R.*, the judgment of *BULLER, J.*, 495, and reported, but without the arguments of counsel, and 1 *B. & P.*, 254 (n).

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life; remainder to his niece, *Grace Pinnock*, for life; remainder to trustees, to preserve contingent remainders; remainder "*to the first son of my said niece, Grace Pinnock, and the heirs of the body of such first son, lawfully issuing;*" remainder to the other sons in like manner; "and for want of such issue male, then to the use and behoof of *all and every the daughter and daughters of my said niece, Grace Pinnock*, begotten or to be begotten; and for default of such issue, then to the use of *Richard Corbin*, and the heirs of his body; and for default of such issue, to the use of the second son [of *Gawin Corbin*, deceased, and the heirs of his body," with a proviso that the *Corbins*, on coming into possession, should take the name of *Dakins*.

The testator, by a former part of his will, devised an estate in *Jamaica* to his brother *Philip* for life; another estate to *Grace Pinnock*, and the heirs of her body; remainder to *Philip Pinnock*, her husband, in fee; another estate to *Philip Pinnock*, in fee; another estate to *Elizabeth Pinnock*, daughter of *Grace*, for life; remainder to trustees, to preserve, &c.; remainder to the heirs of the body of *Elizabeth Pinnock*; remainder to the heirs-male of *Grace Pinnock*, and their heirs, for ever; remainder to all and every the daughters of *Grace Pinnock*, equally to be divided, and to the heirs of their bodies; remainder to *Grace Pinnock*, for life; remainder to *Philip Pinnock*, for life; remainder to the heirs of *Grace Pinnock*. The residue of his real estate in *Jamaica* he devised to *Philip Pinnock*, for life; remainder to *Grace Pinnock*, for life; remainder to trustees, &c., with the same limitations *verbatim* as in the *English* estate, and the same proviso that the *Corbins* should take his name.

The testator died on the 1st of *October*, 1748, his brother *Philip*, and *Grace Pinnock*, being then living. *Philip Dakins* entered upon the premises, and died on the 1st of *May*, 1749. *Philip* and *Grace Pinnock* had issue a son, *Dakins Pinnock*, who was born after the death of the testator, and three daughters; *Elizabeth*, who was born in the lifetime of the testator, and *Mary* and *Grace*, born after his decease. *Dakins* and *Elizabeth* died without issue in the lifetime of *Philip* and *Grace Pinnock*. *Grace Pinnock*, the mother, died on the 1st of *August*, 1769, and *Philip Pinnock*, on the 1st of *March*, 1778. *Mary Pinnock*, on the 1st of *June*, 1774, married *James Dickson*, and died

in the lifetime of her father, leaving *Mary*, the defendant, her only daughter and heir at law. *Grace Pinnock*, the daughter, married *George Pinnock*, and is still living, and she and her husband are the lessors of the plaintiff. The said *Grace Pinnock*, and *Mary Dickson*, the defendant, are the heirs at law of the testator, *Henry Dakins*.

[A question concerning the *Jamaica* estate having come on at the *Cockpit*, Lord LOUGHBOROUGH adjourned the cause, and directed the present ejectment to be brought for the *English* estate, in order to have the opinion of the Court of *King's Bench*.]

The case was argued in *Trinity Term* by *Graham* for the plaintiff, and by *Wilson* for the defendant.

*Graham*, for the plaintiff.—*Grace Pinnock* and *Mary Pinnock*, the daughters of *Grace Pinnock*, took either estates for life, or estates for life with several inheritances in tail, with cross remainders. There are various cases which show that the words “for default of such issue” will not enlarge the life estate expressly given to *Grace Pinnock*, the testator's niece. *Bamfield v. Popham* (b), *Barry v. Edgeworth* (c), *Loddington v. Kime* (d). There is nothing unreasonable in supposing that the testator meant to give life estates to the daughters. The presumption of law is in favour of such an interpretation; and if there is any doubt, the rule laid down in *Garth v. Baldwin* (e) must prevail; that where the intent stands in *equilibrio*, on the face of the will, the Court is not warranted in taking away the benefit of the legal operation of the words. With regard to the second ground—if an estate of inheritance in the daughters is to be inferred, there is no reason for making it a tenancy in common: Courts of law used formerly to lean much to joint tenancy, but latterly, there being found to be no inconvenience in splitting estates, the leaning has been the other way. Still there is no case of an implication of a tenancy in common. *Fishe v. Wigg* (f). Here the will may be effectuated by holding that *Grace* and *Mary* take an estate

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(b) *Canc.* 1702, 1 *P. Wms.* 431, *S. C.*  
 54. (c) *Canc.* 1755, 2 *Ves. sen.*  
 (c) *Canc.* 1729, 2 *P. Wms.* 659.  
 523. (f) *B. R., H.* 1700, 1 *P.*  
 (d) *B. R., E.* 9 *W.* 3, *Salk.* *Wms.* 14.  
 224; 1 *Ld. Raym.* 203; 3 *Lev.*



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in joint tenancy for life with several inheritances in tail, with cross remainders. *Litt.* § 283. *Cook v. Cook* (g).

*Wilson, contra.*—The devise to the unborn daughters of *Grace Pinnock* gave them estates tail. With regard to the testator's *intent*, no doubt can be entertained. It is true that, in general, there must be words of limitation in a will as well as in a deed; but where the intent is manifest, the Court will imply an estate of inheritance, without words of limitation, or any thing like them. In *Gough v. Howard* (h), *CROKE, J.*, puts this case, where a man deviseth *Blackacre* to his eldest son and his heirs for his part or portion, and *Whiteacre* to his youngest son for his part (omitting *heirs*), yet here he shall have it in the same manner as the other hath *Blackacre*. This will is inaccurately penned, and several clauses show that the testator has used technical words without understanding their import. There is no case in which a limitation to an unborn child has been construed an estate for life. [*BULLER, J.*—In *Cook v. Cook*, and I think in *Goodwin v. Goodwin* (i), it was held that after-born children should take for life.] It is manifest that it was the testator's intention that the whole line of *Grace Pinnock* should take, and that, without any *proviso*, for assuming his name. The relative *such*, after the limitation to the sons of *Grace Pinnock*, includes the daughters of sons. The words "sons" and "children" have been held to be words of limitation in a will. *King v. Melling* (k), *Burchett v. Durdant* (l), *Robinson v. Robinson* (m), *Evans v. Astley* (n), *Hodges v. Middleton* (o). The case of *Evans v. Astley* very nearly resembles this, but is even stronger. There the devise was "to every son and sons of the body of *Charles Duckenfield*, and for want of such issue," &c.; and this was held to give an estate tail to the sons of *Charles Duckenfield*, who should take successively. The case was decided on the whole scope and complexion of the will. The word *issue*, in the introduction to the next devise, is a

(g) *Canc. E.* 1706, 2 *Vern.* 545.

(h) *B. R.*, T. 12 *Jac.* 1, 3 *Bulstr.* 127.

(i) *Canc.* 1746, 3 *Atk.* 370.

(k) *B. R.*, M. 24 *Car.* 2, 1 *Ventr.* 225, 231; see *ante*, vol. ii. p. 433, (n).

(l) *Scacc. T.* 2 *W. & M.* 2 *Ventr.* 211.

(m) *B. R.*, M. 30 *Geo.* 2, 1 *Burr.* 38.

(n) *B. R.*, M. 5 *Geo.* 3, 3 *Burr.* 1570.

(o) *B. R.*, T. 20 *Geo.* 3, *ante*, vol. ii. p. 431.

general word applying to all descendants, and shows that the estate was not to go over until all the issue of *Grace Pinnock* had failed. Issue *male*, in the preceding clause, has the same meaning. [Lord MANSFIELD.—It is a word of reference. In the former clause it means for want of such sons.] It is evident, from the whole of the will, that the technical words to give an estate of inheritance to the daughters of *Grace Pinnock* have been left out by mistake; but the Court will supply them, as in the case of an estate to *A*, “and if he die without issue,” which is a mistake of the same kind. With regard to the second point it cannot be supposed that the testator intended such a complicated devise. Very little is required to make a tenancy in common.

Lord MANSFIELD.—Nobody is counsel for the remainderman, who is materially interested in some of the questions. Let it stand for a second argument, and let the remainderman have notice that he may be heard.

Accordingly, in *Michaelmas Term*, the case was argued by the Solicitor-General *Mansfield* for the plaintiff, by *Pigott* for the defendant, and by *Bower* for the remainderman.

*Mansfield*, S. G.—The real question is, whether *Grace Pinnock*, the lessor of the plaintiff, the daughter of *Grace Pinnock*, and the sister of *Mary*, whom she survived, took the whole. The question arises on the devise to the daughters of *Grace Pinnock*, without words of limitation. The lessor of the plaintiff contends that, by that devise, she either took the whole herself for life, or that she and her sister took a joint estate for life, which by survivorship is now vested in herself. The will gives no estate tail to the daughters of *Grace Pinnock*; the words “for default of such issue,” after the devise to the daughters of *Grace Pinnock*, cannot mean the issue of those daughters, because no issue of such daughters have been mentioned. If the words of the will do not give an estate tail, is there any thing in the will to show the intention of the testator, that the daughters of *Grace Pinnock* should take such an estate, and what kind of an estate is it to be, in tail male, female, or general? The testator uses the same words in disposing of the *Jamaica* estate, and it is not probable that the mistake, if accidental, should occur twice. The circumstance that the *Corbins* are required to take the testator's name, and the absence of

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such a direction in the devise to the daughters, seems to show that the latter were not intended to take an estate of inheritance. At all events, even supposing an estate tail to be implied, still the daughters would take a joint estate for life. There are no words of severance, *Litt.* § 283, and therefore, though the inheritances may be several, the plaintiff is entitled to recover.

*Pigott*, for the defendant.—It is not necessary to go through all the cases that have been decided respecting the intention of testators, and the rules of law which have been deduced from them. It will be admitted that the intention of the testator must govern. From the whole scope and purview of this will, it is obvious that it was the intention of the testator that all the issue of *Grace Pinnock* should take before the estate went over. This general intention must prevail and overrule the subordinate intention. The testator's brother, *Philip Dakins*, is first named, and then his niece, *Grace Pinnock*. The words "and for want of such issue male" give an estate in tail male to him, and the words "for default of such issue," and the subsequent limitation, give her an estate in tail general, and take in all her issue female. Unless this be the proper construction of the will, the words "in default of such issue" must be rejected. Had the testator intended that the daughters of *Grace Pinnock* should take estates for life only, he would have limited such estates technically "for life," as in other parts of the will. With regard to the tenancy in common, it must be admitted that, if the daughters took estates for life, it would be a joint estate, but if they took estates tail, it is more consonant to the intention of the testator to hold that they took in common. [Lord Mansfield.—The estates to the sons are in tail general, and to the daughters "for want of such issue male." Now there was a son, and therefore the contingency has not happened. If the estate is limited after failure of issue male of that son, it would be too remote. This point has not been argued. Mr. *Pigott's* argument is much too general.]

*Bower*, for the remainder-man, said that he was not prepared to argue the point thrown out by the Court otherwise than that it would defeat the whole will. It is clear that it was the testator's intent that the limitations subsequent to the first should take effect in some manner, and it is for the Court to say how. The only way to give the remainder-

man an interest at present is to consider it an estate for life in common to the daughters. A presumption arises in favour of this construction from the testator's desire to continue his family name. The devise is to all and *every* the daughters, which would make a tenancy in common.

*Mansfield*, in reply.—It is not necessary to reject the words “for default of such issue;” they mean the issue of *Grace Pinnock*, the only person whose issue had been mentioned before. But those words cannot give *Grace Pinnock* an estate for life in tail, because she has an express estate for life, with remainders to her sons and daughters, who all take by purchase. No case has been cited to show that this is a tenancy in common. Upon all the points hitherto agitated, it is clear that the daughters took estates for life. With regard to the point thrown out by the Court, the words “for want of such issue male” mean merely, on failure of the preceding limitations. If otherwise, the first son must take an estate tail; remainder to the other sons in tail; remainder to himself in fee, which is inconsistent with all the rest of the will. It must be construed in the same manner as if the limitations over were to strangers. It is a mere accident that these parties happen to be the heirs-at-law of the testator, and that they will take on the limitations being void.

Lord MANSFIELD.—There is no case exactly like this, though it much resembles the case of *Doe v. Page (p)*, decided last week. I think, in my own private opinion, that the whole difficulty arises out of a blunder, and that it was meant to follow the devise to the daughters with a limitation to the issue of the daughters, but the Court cannot supply words upon mere conjecture. I am inclined to adopt the construction that the daughters take in fee, a construction warranted by the former limitations. The limitations over are “for want of such issue male,” which must mean *son*. According to the event, there was no want of a son, and therefore the contingency has not happened on which the devisees over are to take effect, and the latter limitations are at an end. This satisfies my conscience in the construction of so doubtful a will.

WILLES, *Justice*.—My opinion has varied several times. I am clear that the testator never meant that the *Corbins*

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should take while there was any issue of the daughters of *Grace Pinnock*. The construction which destroys the remainders over on the birth of a son, would answer the testator's intent, which was, that the *Pinnocks* should take first; but I cannot go that length, as there is no case on the point, and it may affect other cases. The estate to the daughters is a joint tenancy for life, with several inheritances. The lessor of the plaintiff is therefore by survivorship entitled to the whole for life. I think the words "for default of such issue" may in this case give an estate tail to the surviving daughter; but I do not give an express opinion on that question.

BULLER, *Justice*.—I have no doubt on any of the points. The will is a very embarrassed one, and on that I rely a good deal; for if a particular intention do not appear, the words must have their legal sense. With regard to the limitation to the daughters, as the estate is given to them without words of limitation it is only for life, and we are bound to say that the testator did not mean to give an estate tail, as it appears from other parts of the will that he knew how to limit such an estate. The estate is limited to the daughters "for default of such issue male." The rule is, that in wills, if such a construction can be made as to give effect to every word, they shall all stand. This will be done if we construe *issue male* to mean *sons*. Then the limitation to the daughters is an executory devise, and before the expiration of the estate tail, the event on which they were to take was to happen or not. It cannot be a remainder after the estate tail to the sons, because the event on which the daughters are to take might happen before the expiration of the estate tail. The limitations over are all void, and the daughters are entitled to moieties in fee.

Judgment for the plaintiff for one moiety, and for the defendant for the other moiety (q).

(q) See *Doe dem. Dacre v. Dacre*, C. B., E. 38 G. 3, 1 B. & P. 250; *S. C. in Error*, P. T. R. 112; *Doe dem. Cumberbach v. Perryn*, B. R. M. 30 G. 3, 3 T. R. 484; *Lewis dem. Ormond v. Waters*, B. R. E. 45 G. 3, 6 East, 336; *Foster v. Romney*, B. R., M. 50 G. 3, 11 East, 594; *Goodright dem. Lloyd v. Jones*, B. R., E. 55 G. 3, 4 M. & S. 88.

"The uniform language of the Courts, in every case where questions of this nature have been agitated, is adverse to the contingent construction. In opposition to this train of adjudications there appears to be only one authority which can be ad-

duced for giving to the words, 'for default of such issue,' the effect of rendering the posterior limitations dependant on the event of no object of the preceding limitations ever coming into existence. This is *Keene dem. Pinnock v. Dickson*, which arose upon limitations (after certain estates for life) to the first and other sons of *A.*, successively in tail general, and for want of such issue male, to all and every the daughter and daughters of *A.*, thereafter to be begotten, and for default of such issue to *B.* in tail, and in default of such issue to *C.* in tail;—and the question argued was, whether the daughters took an estate for life or in tail; but Lord MANSFIELD's opinion was, that as there had been a son of *A.*, the estate of the daughters never arose, and therefore they (being the testator's co-heiresses) were entitled by descent, which, he observed, would effectuate the intention, as the omission of words of inheritance was evidently a blunder. This decision is at variance with, and is clearly overruled by, the several subsequent cases before cited. It was said by Mr. Justice BAYLEY in *Goodright v.*

*Jones*, not to have been followed in *Doe v. Dacre*, and the determination of the Court in *Goodright v. Jones* has deprived it of even the shadow of authority. In *Pinnock v. Dickson* the doctrine indeed seems to have undergone no discussion, but was evidently (as appears from the close of the judgment) caught at by Lord MANSFIELD as a scheme for securing the property to the nieces and co-heiresses of the testator (who must otherwise have been excluded by strangers, or more remote relations); and the case may be ranked among those in which that eminent judge allowed considerations of such a nature to exercise an undue influence over his mind, disregarding the mischief of shaking general rules." *Hayes's Principles for expounding the Dispositions of Real Estate to Ancestor and Heirs in Tail, &c.* p. 39. The above observations are confirmed by the present report of the principal case, from which it appears that the point as to the contingency was never argued at the bar, and that Lord MANSFIELD's opinion was expressly dissented from by Mr. Justice WILLES.

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DAVID BARCLAY SILVANUS BEVAN and AMBROSE BENING  
v. JOHN LUCAS (a).

Friday,  
21st November

THIS was an action of debt on bond. The defendant prayed oyer of the bond and condition. The bond was from The defendant entered into a bond to the plaintiffs, reciting that the plaintiffs at the recommendation of the obligor had agreed to take *P. J.* into their service and employ, as a clerk in their shop and counting-house, and the condition was, that if *P. J.* should faithfully account for, &c. to the plaintiffs all such sums as he should receive in the service of the plaintiffs then, &c. The plaintiff afterwards took *R. B.* as a partner into their business. Held that the defendant was liable for money embezzled by *P. J.* after the new partnership.

(a) S. C. 1 T. R. 291 (n).

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the defendant and one *John Phillips* for £500, dated 23d *February*, 1779.—The condition recited, that the plaintiffs at the recommendation of the obligors had agreed to take *Phillip Jones* into their service and employ, as a clerk in their shop and counting-house, and the obligors had agreed to become security for his fidelity, as far as £500 each, and the condition was, that if *Philip Jones* should faithfully account for pay, &c. to the plaintiffs all such sums of money, &c. as he should at any time receive, or be intrusted with in the service of the said plaintiffs, and should not embezzle, &c., then, &c.

The defendant pleaded, 1. *Non est factum*; 2. That the plaintiffs, on the said 23d day of *February*, 1779, carried on the business of bankers as copartners, in their own names only, and for and on their own account, and without any other partner, and continued so to do till the 24th of *June*, 1780. That the service, in the condition mentioned, was meant and intended to be performed to the plaintiffs in the trade of bankers so carried on by the plaintiffs only, and not in partnership with any other person. That the plaintiffs, on the day and year last-mentioned, entered into partnership with one *Robert Barclay*, and continued in partnership with him from thence hitherto, and have during all that time carried on the trade in the joint names of the plaintiffs and the said *Robert Barclay*. That *Philip Jones* entered into the service of the plaintiffs on the said 23d of *February*, 1779, and continued till the partnership with *Robert Barclay*, viz. till the 24th of *June*, 1780, and then quitted the service of the plaintiffs, on their own separate account, and afterwards, on the same day and year, entered into the service of the said plaintiffs and *Robert Barclay*. That *Philip Jones*, during all the time he remained in the service of the plaintiffs, did well and faithfully account, &c. 3d plea, That *Philip Jones* entered into the service of the plaintiffs on the 23d of *February*, 1779, and continued in the same till the 24th of *June*, 1780, and then quitted the service of the plaintiffs; and that, during all that time, &c. To the second plea, the plaintiffs replied (protesting that the service was not meant and intended to be performed in the trade carried on by them only) that the service was meant and intended to be performed to them in the business so then carried on by them during all the time they should continue the same business, and the said *Philip Jones*

should continue to serve therein. That on the 24th of June, 1780, they did admit into partnership in their said trade, and in the same house wherein they exercised it at the time of making the said writing obligatory, the said *Robert Barclay*; and the said *Robert Barclay*, by such admission, became possessed and entitled to one-fourth share of the said trade, and hath so continued. That *Philip Jones*, on the 23d of February, 1779, entered, &c., and continued in the service of the plaintiffs till the said partnership, and from that time till the 16th of February, 1781, and was not during all that time discharged. That after the said partnership, and while *Philip Jones* so continued in his said service, viz., the 16th of February, 1781, he received, in his said office and employment, of one *Mark Groves*, £20. 16s., three-fourths of which, viz., £15. 12s., was received by him, *Philip Jones*, on account of the plaintiffs, and which sum the said *Philip Jones* was afterwards requested to pay, &c.—To the third plea, the plaintiffs replied that the said *Philip Jones* did not quit the service of the plaintiffs from the 23d of February, 1779, until and upon the 16th of February, 1781, and did not during all that time once quit the same, and that after, &c., and whilst, &c. viz., on the said 16th of February, 1781, the said *Philip Jones*, as clerk of the said plaintiffs, did receive £15. 12s., on account of the said plaintiffs, &c.—To the first replication, the defendant rejoined (protesting that the service was not meant to be performed as in the replication mentioned, protesting also that the plaintiffs did not take the said *Robert Barclay* into partnership in their said trade, and in the same house to a fourth part, &c.); that after the partnership, all the monies received by the said *Philip Jones*, in his said office and employment of clerk to the plaintiffs and *Robert Barclay*, were received by him on the joint account of the plaintiffs and *Robert Barclay* as copartners, and traverses the receipt of three-fourths of the money in the replication mentioned by *Philip Jones* on account of the plaintiffs. To the second replication, the defendant rejoined, that *Philip Jones* did quit the service of the plaintiffs in manner and form on which issue was joined. The plaintiffs, to the first rejoinder, surrejoined that *Philip Jones* did receive the said three-fourths of the said sum of money on account of the said plaintiffs; on which issue was joined.

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The cause was tried before Lord MANSFIELD, at *Guild-hall*, after last term, when the following case was reserved :

That the bond stated in the declaration is the deed of the defendant. That, on the 24th of *June*, 1780, *Robert Barclay* was taken into partnership with the plaintiffs. That, on the 16th of *February*, 1781, *Philip Jones*, the clerk mentioned in the condition of the bond, received of *Mark Groves* £20. 16s. on account of the new partnership, and has not paid it over to the plaintiffs, or to the new partnership, or any of them. The question for the opinion of the Court was, whether the defendant is liable to the plaintiffs in this action ?

*Chambre*, for the plaintiffs.—The substantial question is, whether, by taking in a new partner, the defendant is discharged, or at least whether he is discharged to the extent of the new partner's share. No doubt would be entertained if the question were stated to persons not educated as lawyers. It is a question of indemnity, and the intention of the parties must be regarded, and whether the plaintiffs have sustained any damage. If the case of *Wright v. Russell* (b) had not occurred, this question could never have been made. But it is not necessary to inquire into the merits of that decision, for the grounds of it do not apply in the present case. It proceeded on the ground that it was an attempt to make the defendant responsible for the property of another, for which he had not engaged, and it also proceeded in part on the form of the breach. The present question is not to be determined by the technical rules which govern joint and separate property, or the forms of actions; it must be decided by the intention of the parties. The two cases (c) relied upon in *Wright v. Russell* do not apply here. Here there has been a breach of the bond. *Jones* was not faithful in his service, and it has been as injurious to the plaintiffs as if the property had been separate. It would cause great inconvenience if, on the accession of a new partner, it were necessary to change all the sureties.

*Baldwin, contra*.—There is no material distinction between the present case and that of *Wright v. Russell*. On

(b) *C. B.*, H. 14 Geo. 3, 2 *ricke*, 24 Car. 2, 2 *Saund.*, 412; *Blackst.* 934; 3 *Wils.* 530, *Horton v. Day*, cited 2 *Saund.*, 414; *All.* 10, *nomine Haughton*

(c) *Lord Arlington v. Mer-* *v. Day.*

the reason of the thing, also, it would be very inconvenient if a man were to be bound for all the trades and partnerships which the obligees might engage in. There is no hardship in requiring that the obligees should send for the sureties, and inquire whether they were willing to continue. The property here is joint, the embezzlement is of the joint property, the injury is to the plaintiffs and *Robert Barclay* jointly. How, then, can three of the partners alone maintain the action?

LORD MANSFIELD.—The question turns, as Lord Chief Justice DE GREY observes, in the case which has been cited, upon the meaning of the parties. In endeavouring to discover that meaning, the subject-matter of the contract is to be considered. It is notorious that these banking-houses continue for ages with the occasional addition of new partners. In such establishments clerks are necessary, who now and then succeed as partners, an arrangement very proper and very beneficial to the clerks. The house requires security for their honesty. Now it seems to me to make no difference whether a new partner is introduced or not, for there is no doubt that it is a security to the house. I am glad that there is a distinction between this case and that decided in the *Common Pleas*; for I think that the plaintiffs are entitled to recover to the extent of the whole sum embezzled, or at all events to the extent of their own share.

WILLES, *Justice*.—I am of the same opinion. The intention of the parties must be looked for in the condition of the bond. The recital there is, “in their shop and counting-house,” not in their particular service. Great inconvenience would arise if it were otherwise. The surety runs no greater risk after the accession of the new partner than before. He is not bound for the servant’s obedience to the new master, but only for his honesty.

BULLER, *Justice*.—I cannot agree to the doctrines laid down in *Wright v. Russell*; but supposing that case rightly decided, it does not apply here, for the demand is confined to the plaintiffs’ share. What my Lord says is decisive. The security is to the house. Lord Chief Justice DE GREY says that it is the plaintiffs’ own act, but if the plaintiffs had covenanted to employ the clerk for a certain time in their shop, could he not maintain an action, and compel them to employ him still? Then if the contract remains on one

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side, it must on the other. I agree that the bond would not extend to a new trade, because it is only for the clerk's fidelity in that particular trade. It is not confined as to the extent of that trade, otherwise it would be very inconvenient, and a man could never increase his trade.

*Postea* to the plaintiffs (*d*).

(*d*) The principle of the cases, respecting the continuing liability of sureties, is the intent of the parties as collected from the instrument. In general, where the security is given to one person, or to a firm, and there are no circumstances which indicate the intention of the parties that it should be a continuing security, in case of the accession of a new partner, or the death of the party, or of one of the parties, to whom the security was given, it will, on such death or accession, become inoperative. *Bodenham v. Purchas*, *B. R.*, *M.* 59 *Geo.* 3, 2 *B. & A.* 39; *Strange v. Lee*, *B. R.*, *E.* 43 *Geo.* 3, 3 *East*, 484; *Barker v. Parker*, *B. R.*, *T.* 26 *Geo.* 3, 1 *T. R.* 287; *Weston v. Barton*, *C. B.*, *M.* 53 *Geo.* 3, 4 *Taunt.* 673. So where *A.* became bound to *B.*, under condition that *C.* should truly account to *B.* for all sums of money received by *C.* for *B.*'s use, and *C.* afterwards, with *B.*'s knowledge, took *D.* as his partner: Lord ELLENBOROUGH ruled that the guarantee did not extend to sums of money received by *C.* for *B.*'s use, after the formation of the partnership. *Bellasis v. Elsworth*, 3 *Campb.* 53. So, where the obligor was bound for the fidelity of *A.* to *B.*, *C.* and *D.*, a voluntary society, and that society was afterwards incorporated, it was held that the obligor was not liable for *A.*'s fidelity to the corporation.

*Dance v. Girdler*, *C. B.*, *E.* 44 *Geo.* 3, 1 *B. & P.*, *N. R.* 34.

But where, as in the principal case, there appears to be an intent that the security should be a continuing one, as where there are expressions importing that the clerk is to serve the firm, and not the individuals who compose it, the obligor will not be discharged by a change in the parties interested in the concern. Thus, where a bond was given to seven persons as trustees of the *Globe Insurance Company*, conditioned for the faithful service of *A. B.* "during his continuance in the service of the said company," it was held that the obligor was liable notwithstanding the intermediate changes of the original holders of shares in the company by death and transfer. *Melcalf v. Bruin*, *B. R.*, *E.* 50 *Geo.* 3, 12 *East*, 400; and see *Kipling v. Turner*, *B. R.*, *M.* 2 *Geo.* 4, 5 *B. & A.* 261.

Many cases have also arisen upon these securities with regard to the time at which they expire. See *Liverpool Waterworks v. Atkinson*, *B. R.*, *T.* 45 *Geo.* 3, 6 *East*, 507. *St. Saviour, Southwark v. Bostock*, *C. B.*, *E.* 46 *Geo.* 3, 2 *B. & P.*, *N. R.* 175; *Havell v. Long*, *B. R.*, *H.* 44 *Geo.* 3, 2 *M. & S.* 363; *Sansom v. Bell*, 2 *Campb.* 39.

It may be doubtful whether, since the more recent decisions, the principal case can be sustained. In *Strange v. Lee*,

Lord ELLENBOROUGH says, *clay v. Lucas.* So, in *Weston v. Barton* (4 Taunt. 681), the same judge observes, "This, then, being the construction of the instrument from almost all the cases, in truth, we may say from all (for though there is one adverse case of *Barclay v. Lucas*, the propriety of that decision has been much questioned), it results that where one of the obligees dies, the security is at an end." It may, however, be remarked, that the principal case was not considered by Lord ELLENBOROUGH to have been overruled by *Strange v. Lee*, and is cited by him in *Metcalfe v. Bruin* (12 East, 407), for the principle upon which it professed to proceed, viz. the intent of the parties at the time of entering into the contract to provide for a service to a changeable body carrying on the same concern.

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THE KING v. THE INHABITANTS OF LITTLE BOLTON.  
(Reported, Caldecott, 367.)

Saturday,  
22d November.

THE KING v. CHARLES BEMBERIDGE.

Saturday,  
22d November.

THIS information contained three counts. The first stated that *Henry Fox*, afterwards Lord *Holland*, was appointed receiver and paymaster-general of the forces, 26th July, 1757, and continued till the 11th June, 5 Geo. 3, and as such received and paid divers sums of money. It then stated the succession of paymasters from Lord *Holland* down to Colonel *Bane*, and charged, "That the place and employment of accountant in the said office and place of receiver and paymaster-general, during all the time heretofore mentioned, was a place and employment of great public trust and confidence, touching the making up the accounts

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of the receiver and paymaster-general, and the adjusting and settling the same with the auditor of the imprest."

That the accounts of Lord *Holland* were, 11th *January*, 12 *Geo. 3*, made up by *John Powell*, Esq., then being accountant in the said office, and delivered to the auditors of the imprest, part to *W. Aislaby*, Esq., one of the auditors, and the residue thereof, including the final account of the said Lord *Holland*, to *Lewis*, Lord *Sondes*, the other auditor, in order to be adjusted, settled, and passed, according to the ancient course of the *Exchequer*. That divers sums of money ought to have been inserted in the said accounts as charges of the said *Henry*, Lord *Holland*, that is to say (enumerating several sums received by different persons under the authority and for the use of Lord *Holland* as paymaster, several other sums retained by Lord *Holland* on different accounts, and two sums, amounting to £9,500 and odd, being profit of remittances made by Lord *Holland* to *Peter Taylor*, Esq., deputy-paymaster of the forces in *Germany*), which said sums were omitted. That after the delivery of the said accounts to the auditors, and before the said final account was adjusted and settled by Lord *Sondes*, viz. 31st *March*, 16 *Geo. 3*, *Charles Bembridge*, Esq., became and was accountant in the office and place of receiver and paymaster-general. That the said final account continued open and unsettled for a long time after the said *Charles Bembridge* became, and whilst he was, accountant, viz. for six years. "That it was the duty of the said *Charles Bembridge*, as accountant as aforesaid, to disclose and make known to the said *Lewis*, Lord *Sondes*, any charges upon the said *Henry*, Lord *Holland*, as such receiver and paymaster-general as aforesaid, which had been omitted to be inserted in the said accounts."

That whilst the said final account remained open and unsettled, the said *Charles Bembridge* was at divers times requested by the said Lord *Sondes* to discover to him any charges on the said Lord *Holland*, within the knowledge of him the said *Charles Bembridge*, which ought to have been inserted in the said accounts, and had been omitted. That the said *Charles Bembridge*, when he was so requested, well knew the said several sums of money hereinbefore mentioned were not included therein, but were omitted to be inserted in the said accounts as charges on the said Lord *Holland*. That the said *Charles Bembridge*, being such

accountant as aforesaid, wrongfully, unjustly, and fraudulently contriving to conceal from the said *Lewis*, Lord *Sondes*, the said auditor of the imprest, to whom the said final account was delivered as aforesaid, the said several sums of money which ought to have been charged as aforesaid, and to cheat and defraud our said present Sovereign Lord the *King*, did not, at the several days and times when he was so requested as aforesaid, discover or make known to the said *Lewis*, Lord *Sondes*, the several sums of money, which, &c., but wickedly, wilfully, fraudulently, knowingly, and corruptly did refuse and neglect to discover or make known the same to the said *Lewis*, Lord *Sondes*, and did permit and suffer the said *Lewis*, Lord *Sondes*, to proceed to close the said final account of the said *Henry*, Lord *Holland*, without the said sums of money having been brought into the same, or made known to the said *Lewis*, Lord *Sondes*, contrary to the duty of the said *Charles Bembridge*, as such accountant as aforesaid, to the evil example, &c.

The second count did not state the succession of paymasters, nor the general duty of the accountant, and stated that divers sums of money (enumerating them without any particulars concerning them) ought to have been included, and were omitted. Having before stated that the accounts were made up by *John Powell* the accountant, it then stated the appointment of the defendant, in the same words as in the first count: that it was his duty, as accountant as aforesaid, forthwith to disclose and make known to the said Lord *Sondes* any omission out of the said account of charges made upon the said *Henry*, Lord *Holland*, within the knowledge of him the said *Charles Bembridge*. It then stated the request, and neglect, and refusal as in the first count.

The third count stated that *Henry*, Lord *Holland*, in his lifetime was paymaster; that after he went out of office, viz. 11th *January*, 12 *Geo. 3*, his final account was made up by *John Powell*, then being accountant, and delivered to Lord *Sondes*; that afterwards, and after the death of Lord *Holland*, *Charles Bembridge* became accountant in the said office; that the final account remained open and unsettled at that time, and for six years, while the said *Charles Bembridge* was accountant; that it was the duty of the said *Charles Bembridge*, as such accountant as aforesaid, forthwith to have discovered and made known to the said *Lewis*, Lord

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*Sondes*, any charges omitted in the said final account of the said Lord *Holland*, or any other account of the said Lord *Holland*, as such receiver and paymaster-general, which had not been brought into or inserted in the said final account, or any other account, delivered to the auditors of the imprest, or either of them, within the knowledge of him the said *Charles Bembridge*; that divers sums of money (enumerating them) which ought to have been inserted in the final or some other account, were omitted; that the said *Charles Bembridge*, whilst he was accountant, well knew that the said sums ought to have been inserted in the said final account, or in some other account of Lord *Holland*, as paymaster, delivered to the auditors or either of them. Yet the said *Charles Bembridge* did not forthwith discover or make known to the said *Lewis*, Lord *Sondes*, the said omissions or any of them, as it was his duty, as such accountant as aforesaid, to have done, but wickedly did withhold the said information, &c.

The information was entitled of *Easter Term*, 23 Geo. 3. In *Trinity Term* following the defendant pleaded not guilty, and the information was tried before Lord MANSFIELD at *Westminster* after *Trinity Term*, when the defendant was found guilty generally.

*Bearcroft*, *Scott*, *Erskine*, and *Adam* moved in arrest of judgment, or for a new trial (*a*), and *Lee*, A. G., *Sir T. Davenport*, *Cowper*, *Wilson*, and *Baldwin* showed cause. As the arguments are noticed in the judgment of Lord MANSFIELD, they are omitted in this place.

Lord MANSFIELD.—Though the principles upon which this prosecution is founded may be old, the specific applica-

(*a*) On *Saturday* the 8th *November*, Lord MANSFIELD at the rising of the Court said, that understanding that a new trial was to be moved for on behalf of the defendant, and *Monday* being the last day of moving, he thought it proper to give notice that the Court would not hear a motion for a new trial for a defendant convicted of a misdemeanor, unless he were present in Court; that sometimes the personal appearance had not been insisted on, either by con-

sent or because it has been overlooked; but the Court had considered it, and found the rule to be fully established, and it ought to be adhered to. *Bearcroft* said, that having received notice from the *Solicitor-general* that the strict rule would be insisted on, he had looked into the cases, and could not contend that the rule was not as Lord MANSFIELD had stated it. The defendant accordingly appeared in Court.

tion of them is new, and it is therefore important to the defendant, and to the public, that the evidence and the law should be accurately understood. There are two motions depending—in arrest of judgment, and for a new trial. The new trial is moved for on two grounds; first, that the second and third counts are bad; and, secondly, that the verdict is against evidence. With regard to the first objection, I am not satisfied that the counts are bad; but whether they are so or not is immaterial, because the Court is guided by the report of the Judge who tried the cause, and my direction and the verdict went both on the first count. The others were not thought of. The second, and the material objection, is as to the sufficiency of the evidence to maintain the verdict.—It is said for the defendant, that two things are to be made out: first, that it was an office of trust, touching settling with the auditors; and, secondly, that the defendant in his office knowingly, and contrary to his duty, concealed, &c. Both of these must certainly be made out. As to the first—no money passes through the hands of the accountant, his office concerns the accounts of others; there is no written constitution; what his duty is can only be learned from what he has always done. [His Lordship then stated the evidence as to this point.] Another doing the business occasionally is no answer, unless that other had received the fees. Then it is said that he was not able to compel production of the accounts. That might have been an objection if he had been prosecuted for not adjusting the accounts. The process would then go against the paymaster, and he would be compelled to produce them. The duty of the defendant is obvious; he was a trustee for the public and the paymaster, for making every charge and every allowance he knew of; he saw that all the annual accounts had been given in and attested, and that articles antecedent to those attested accounts had been omitted. It is impossible to justify *Powell* in making those attestations. If the defendant knew of the omission, he must have applied to *Powell* for explanation; and if he concealed it, his motive must have been corrupt. That he did know was fully proved, and he was guilty therefore, not of an omission or neglect, but of a gross deceit. The object could only have been to defraud the public of the whole, or of part of the interest. On the whole I have no doubt but that there was sufficient evidence on both grounds.

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As to the motion in arrest of judgment the objection is, that this is a civil injury, and not indictable, and it is said that there is no precedent. The law does not consist of particular cases but of general principles, which are illustrated and explained by these cases. Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatever way the officer is appointed. In *Vidian (b)* there is a precedent of an indictment against the *Custos Brevium* for losing a record. Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country. An indictment has been sustained for concealing public money, *27 Ass. pl. 17*, though this, as against a private person, would only have been actionable. The rule is well laid down by Mr. Serj. *Hawkins (c)*, that all kinds of crimes of a public nature, all misdemeanors whatsoever of a public evil example against the common law, may be indicted; but no injuries of a private nature, unless they some way concern the King. So it is laid down in an anonymous case *(d)*, that any public officer is indictable for misbehaviour in his office. No doubt the offices concerning the revenue are of great importance to the public. I am therefore of opinion, that both the rules ought to be discharged.

WILLES and BULLER, *Justices*.—Of the same opinion.

WILLES, *Justice*, then pronounced the judgment of the Court, which was six months' imprisonment, and a fine of £2,650, (the sum received by the defendant for making up the accounts) *(e)*.

*(b)* *Vidian's Entries*, p. 213.

*(c)* *Book ii. c. 25, s. 4.*

*(d)* *B. B. H. 2 Ann. 6 Mod.*  
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*(e)* In the course of the argument, the case of *Peter Leheup*, Esq. was cited, which was an information tried at bar in *Hilary Term*, 28 *Geo. 2.*

The defendant and three others had been appointed re-

ceivers and managers of a lottery called the Museum lottery, under stat. 26 *Geo. 2, c. 22*, for the purpose of raising a sum of money for the establishment of the *British Museum*. The act directed that the subscriptions for the lottery should be received publicly, from such a time to such a time, after notice in the *Gazette*, and that no per-

son should subscribe for more than twenty tickets. The information was for receiving subscriptions privately before the time appointed, and by fictitious names giving a greater number of tickets to one person, and other evasions of the statute. There were ten counts, all con-

cluding in open violation of the said act of Parliament, and contrary to the form and effect thereof. They all charged the offence to be contrary to the duty of his said office of receiver. The defendant was found guilty on several counts.

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HISKUYSON v. WOODBRIDGE.

(*Reported, ante*, vol. i. p. 166, note [† 55].)

Tuesday,  
25th November.

THE KING v. THE INHABITANTS OF EDISORE, otherwise  
HEDSOR.

(*Reported, Caldecott*, 371.)

Wednesday,  
26th November.

BINGLEY v. MALLISON and Another (a).

Wednesday,  
26th November.

THIS was an action of trover brought by the plaintiff against the defendants, who were assignees of a bankrupt. The cause was tried at *York*, before EYRE, B., and the only question was upon the petitioning creditor's debt. The debt consisted of a bill of exchange given by the bankrupt before his bankruptcy. The bill was made in *January*, 1782, became payable in *June*, and was indorsed to the petitioning creditor in *November*. The act of bankruptcy was committed in *October*. EYRE, B., was of opinion that this was not a sufficient petitioning creditor's debt to support the commission, and a verdict was found for the plaintiff for the value of the goods. A rule having been obtained to show cause why there should not be a new trial,

A bill of exchange drawn by a bankrupt before his bankruptcy, but not indorsed to the petitioning creditor until after the act of bankruptcy, is a good petitioning creditor's debt.

*Lec*, A. G., *Davenport*, and *Hotham*, showed cause. This rule was granted on the authority of two cases, *ex*

(a) S. C., cited 1 *Cook's B. L.*, 34, 8th edit., *nomine Bingley v. Maddison*.

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*parte Thomas (b)*, and an anonymous case in *Wilson (c)*. The first case was a petition of the bankrupt himself, and the *Chancellor* might refuse to supersede the commission, where there were many creditors, and a clear act of bankruptcy. The latter is a very short note, and the case does not appear to have been argued. It may, therefore, be considered that there is no express decision on the point; and the reasoning of the Court, in several cases, is against the validity of the debt. *De Golds v. Ward (d)*; *Ex parte Lee (e)*. Every act of bankruptcy is supposed in law to be a fraud upon the petitioning creditor, as well as upon every other creditor, but how could it be a fraud upon this man who had no debt existing at the time? The bankrupt could not mean to delay or to defeat him. Put the case, which indeed was the fact here, that the holder of the bill is indebted to the bankrupt in a large sum of money, and cannot, therefore, himself sue out a commission: shall he be allowed, by indorsing the bill, to confer that right on another? By the statute, 34 and 35 H. 8, c. 4, § 1., the *Chancellor* has authority to grant a commission of bankrupt upon complaint made by any parties grieved; but the petitioning creditor, in this case, was not a party grieved, for he had no debt at the time of the bankruptcy. It has been held that where a note is indorsed after the act of bankruptcy, the holder cannot make it the subject of a set off, *Marsh v. Chambers (f)*, and the same rule ought to hold with regard to a petitioning creditor's debt. By this contrivance, a creditor for less than £100 might have, by an indorsement, the means of taking out a commission.

Lord MANSFIELD (stopping *Arden*).—This seems to me a very clear case. A bill of exchange is made, which is due before the act of bankruptcy, and is indorsed before the commission taken out. The case stands clear of all circumstances of fraud. An indorsement of a bill of exchange is a case in which the law allows an assignment of a chose in action. No new debt is created, but the old debt is transferred, and the indorsee stands in the place of the original payee. The indorsee always came in under the commission,

(b) *Canc.* 1747, 1 *Atk.* 73.(e) *Canc.*, H. 1721, 1 *P.*(c) *C. B.*, T. 1 *G.* 3, 2 *Wils.**Wms.* 782.

135.

(f) *B. R.*, T. 18 *G.* 2, 2 *S:r.*(d) 1 *Br. P. C.* 536.

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because he came in on the ground of the original debt. Thus it stands upon principle, and the cases are positive, and of the highest authority.

BULLER, *Justice*.—This case does not go the length Mr. HOTHAM supposes. I take it to be clear that you cannot, by joining two notes for less than £100, make a man a petitioner who would not be one otherwise. But this is a note for £100 (*g*).

Rule absolute (*h*).

(*g*) There is some obscurity in the judgment of BULLER, *J*. In Mr. J. LE BLANC'S MSS. it runs thus: "this is for a note of £100, and differs from a note of £50, when at the time of the act of bankruptcy there was no subsisting debt on which a commission could issue. When that case happens it would make another question." In the argument in *Glaister v. Hewer*, *B. R.* 38 G. 3, 7 T. R. 490, Mr. J. BULLER is stated to have said in this case, "that if two cre-

ditors had each of them bills for £50 on the bankrupt at the time of his bankruptcy, they could not by a subsequent indorsement from one to the other make a petitioning creditor's debt of £100." Upon which Lord KENYON remarked, "that he could not accede to what was supposed to have been said by Mr. J. BULLER in the case of *Bingley v. Maddison*."

(*h*) See *Ex parte Douthat*, *B. R. M.* 1 G. 4, 4 B. & A. 67.

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SPRING dem. TITCHER v. BILES and Another.

(Reported, 1 T. R., 435, (*n*).)

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26th November.

DUNN v. LARGE.

Wednesday,  
26th November.

**T**RESPASS for the recovery of mesne profits after judgment in ejectment. The declaration was in the usual form, that the defendant broke and entered the premises, and staid and continued therein, and ejected the plaintiff, and kept him out of possession, and during that time took the profits to himself, whereby the plaintiff, during that time, lost all the issues and profits thereof, and was put to great expense

ting up the inn, and destroying the custom, unless such damage be specially stated in the declaration.

In trespass for mesne profits after ejectment for the recovery of a house used as an inn, the plaintiff cannot recover the loss which he has sustained by the defendant shut-

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in recovering possession. The defendant pleaded not guilty. The cause was tried at the Summer Assizes, at *Bury*, when the plaintiff, after proving the judgment in ejectment and writ of possession, and the value of the rent during the time he was kept out of possession, and the costs of the ejectment, to the amount of above £70, offered to give in evidence other special damage, viz., that the defendant had been tenant to the lessor of the plaintiff for a term, and refusing to go out at the expiration of the term, the lessor of the plaintiff was obliged to recover possession by ejectment; that the demised premises consisted of an inn at *Brandon*, in *Suffolk*, which if the defendant had quitted, as he ought to have done, at the end of his term, the lessor of the plaintiff could have sold for £800; that the defendant, during the time he had held over and pending the ejectment, had shut up the inn, and stationed a person there to direct travellers to another inn, which the defendant had taken in the same town, and by that means drew away the custom, so that, by the time the plaintiff recovered possession in the ejectment, the inn would not sell for more than £500. *HOTHAM, B.*, who tried the cause, refused to receive this evidence, because it was not specially stated in the declaration. A verdict having been found for the plaintiff for £70 only, a new trial was now moved for, on the ground that the evidence had been improperly rejected by the learned Judge; but the Court was of opinion that he had acted correctly, and refused a rule to show cause.

Thursday,  
27th November.

BOVARA v. BESSESSTI (a).

The Court will not discharge on common bail a defendant held to bail on a Judge's order, granted upon the copy of an affidavit of the debt made at

*Hamburgh*, authenticated by the magistrates of that city, and corroborated by the affidavit of persons here, to the credit of the party making the affidavit.

THE defendant was held to special bail by an order of a Judge at chambers, upon an affidavit of the debt made at *Hamburgh*, a copy of which had been sent over, authenticated by the magistrates of *Hamburgh*, under the seal of the burgomaster. There was also an affidavit from persons in this country, who swore to their knowledge of the creditor

(a) S. C. cited 1 *Tidd's Pr.* 165, 8th ed.

at *Hamburg*, that he was a man of credit, and that they believed the contents of his affidavit.

Sir *T. Davenport* having obtained a rule to show cause why the defendant should not be discharged on filing common bail,

*T. Cowper* showed cause.

LORD MANSFIELD.—Before the statute (*b*) every person might hold to bail for any sum; but by that act an affidavit is required. Before the statute any man might be held to bail by order of a Judge, and that authority remains as before. I have known many applications of the same sort on certificates from consuls abroad. The precise form of the authentication I do not remember. This is a certificate from abroad of the affidavit having been made before a magistrate.

WILLES, *Justice*.—My doubt is, because the original affidavit is not sent over, as is always done in the case of affidavits made in Ireland (*c*), to hold to bail here.

BULLER, *Justice*.—If the affidavit were sent over, it could be of no use here. It is right that it should be left abroad, because, if it be false, it is a perjury there, and not here.

Rule discharged.

(*b*) 12 G. 1, c. 29.

(*c*) See *stat.* 55 G. 3, c. 157, grant commissions for taking affidavits in all parts of *Great Britain*.  
for empowering the courts of *Britain*.  
law and equity in Ireland to

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BOVARA

v.

BESSESTI.

THE KING v. FREEMAN ECCLES and Others.

Wednesday,  
26th November.

THIS was an indictment for a conspiracy, found at the borough sessions of *Liverpool*, in the county palatine of *Lancaster*, and removed into this court. It was tried before BULLER, J., at the last *Lancaster* assizes.

The indictment stated that *Freeman Eccles* and six others, devising and intending unjustly, unlawfully, and by indirect means to impoverish one *Henry Booth*, and to reduce to beggary and want the said *Henry Booth*, and to hinder and

to impoverish *H. B.* and to hinder him, &c.; held good. Indictment against *F. E.* and six others. The issue stated, "And now, that is to say, on, &c. cometh the said *F. E.* and others, by *H. D.* their attorney, and having heard the said indictment read, they say, and each of them severally says, that they are not guilty thereof, &c." after verdict of guilty held sufficient.

Indictment stated that defendants intended unlawfully, &c. and by indirect means to impoverish *H. B.* and to hinder him from using his trade, &c. unlawfully conspired, &c. by indirect means

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deprive the said *Henry Booth* from using and exercising his trade and business of a tailor, which he then and there used and exercised, on the 28th *November*, 23 G. 3, the said *Freeman Eccles* (and the six others) wrongfully, fraudulently, maliciously, and unlawfully did confederate, conspire, combine, and agree amongst themselves, by indirect means, to impoverish the said *Henry Booth*, and to deprive and hinder him from following and exercising his aforesaid trade or business of a tailor; and the said *Freeman Eccles*, &c. in pursuance of and according to the unlawful conspiracy, combination, and agreement aforesaid, on the said 28th of *November* indirectly, wrongfully, unlawfully, maliciously, and unjustly did prevent and hinder the said *Henry Booth* from following his aforesaid trade or business in *Liverpool* aforesaid, and thereby did then and there greatly impoverish the said *Henry Booth*, to the great damage, &c. The indictment contained another count not materially different.

The issue was joined in the following manner:—And now, that is to say, on *Friday*, next after the morrow of the *Holy Trinity*, in this same term, before our said Lord the King, at *Westminster*, cometh the said *Freeman Eccles* and others, by *H. D.* their attorney, and having heard the said indictment read, they say, and each of them severally says, that they are not guilty thereof, &c.

The verdict was taken against *Eccles* and five of the others, and there was no finding at all as to the sixth.

*Chambre* now moved an arrest of judgment, and took two objections to the indictment. 1. The charge is too general; there are no particular facts mentioned on which the defendants might have prepared to defend themselves. The indictment should have stated a particular act, and have charged the conspiracy to have been with a view to that act; but nothing more than the consequence of the act is stated, which is too general. *Hawk. P. C. b. ii. c. 26, s. 59.* A conspiracy is certainly indictable, though no act be done; but still the act intended to be done must be stated. There is no case of authority that a general charge of a conspiracy to injure is good. *The King v. How (a), The King v. Munoz (b), 14 Vin. 386,* are authorities to show that so general a statement as this is bad. [WILLES, J., referred

(a) *B. R., E. 12 G. 1, 1 Sr.*  
 699.

(b) *B. R., H. 13 G. 1, 2 Str.*  
 1127.

to *The King v. Kinnersley* (c).] It must be a conspiracy to do something. [BULLER, J.—Here the act intended is stated.] It is only the consequence and not the means that is stated. [Lord MANSFIELD.—Be the means what they may, if it be in consequence of a conspiracy it is criminal.] 2. The issue is not well joined, for it does not appear that any of the defendants but *Eccles* have pleaded.

Lord MANSFIELD.—The conspiracy is to prevent *Booth* from working, the consequence is poverty. Both the conspiracy and the consequence are stated; but it is objected, that there is no allegation of the means. Such an allegation is unnecessary. The later cases, and especially *The King v. Kinnersley*, are very strong. As to the objection on the issue, the record goes on and says, “they and each of them.”

BULLER, Justice.—The indictment states more than is sufficient in alleging that the defendants conspired “by indirect means.” The means are matter of evidence. If the indictment had stated that they conspired to prevent *Booth* from carrying on his trade, it would have been sufficient: “by indirect means” is surplusage. As to the issue, it does not appear by this record that any of the defendants let judgment go by default. Therefore the Court cannot go into the matter, and the issue is joined, though in a very slovenly manner. If any of the defendants have in fact let judgment go by default, and are injured by this manner of entering the issue, they have their remedy against the clerk in the *Crown Office*.

Motion denied.

(c) *B. R., T. 5 G. 1, 1 Str.* 193.

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## FOLKES v. CHAD and Others.

Thursday,  
27th November.

Trespass brought by order of the Court of Chancery, to try whether a bank erected by the plaintiff was a nuisance to the harbour of Wells. The jury found for the defendants, and accompanied the verdict with the following observations, which were indorsed on the *postea*: "The jury also find that they all agree that the continuance of the bank is some injury to the harbour, but are not all agreed to its being a material injury. That it did not appear to the jury that any legal proceedings were had within the space of twenty years from the time of the erection of the bank." Held that this finding was no ground for setting aside the verdict, either as showing that the nuisance was immaterial or that the possession of the bank by the plaintiff for twenty years was a bar.

THIS cause having been tried a third time (a) at the Summer Assizes for the county of *Norfolk*, before Mr. Justice ASHURST, a verdict was found for the defendants, and a special indorsement was made upon the *postea* to the following effect: "The jury also find that they all agree that the continuance of the bank is some injury to the harbour of *Wells*, but are not all agreed to its being a material injury: that it did not appear to the jury that any legal proceedings were had within the space of twenty years from the time of the erection of the bank." *Mansfield*, S. G., on behalf of the plaintiff, obtained a rule to show cause why the verdict for the defendants should not be set aside, and a verdict entered for the plaintiff, or a new trial had between the parties. He grounded the first part of his rule on the fact found by the jury, and indorsed, that no proceedings at law had been had within twenty years from the time of erecting the bank, which he had insisted, at the trial, entitled the plaintiff to a verdict; and he relied on what he said had been the practice on the western and *Oxford* circuits—not to suffer a nuisance to a way to be impeached after twenty years' continuance. The second part of his rule he founded on the indorsement, by which it appeared that the jury did not find it a material injury, which he said was necessary to constitute a nuisance. ASHURST, J., who tried the cause, reported that, in his directions to the jury, he told them that there were two matters for their consideration: 1. Whether the harbour was materially injured by the bank in question. 2. Whether the removal of the bank would materially tend to restore the harbour. He told them that it might be worth while to consider the second question, and to state their opinions on it, though it was not necessary to their finding their verdict for the plaintiff or defendants. That as to the twenty years' continuance, he did not agree with the counsel for the plaintiff, that it entitled the plaintiff to a verdict; but he told the jury to find that fact, as it might be material in guiding the discretion of the Court of *Chancery*. The jury found a verdict for the defendants, accompanied by the special matter stated on the *postea*. The learned Judge

(a) Vide *ante*, p. 157.

added, "I told the jury that they could not find for the defendants unless they thought it a material injury. Therefore they must have thought it material. I understood the meaning of the jury to be, that they were not agreed as to the precise extent of the injury, and how far the removal of it might or might not restore the harbour. I thought myself that the bank was an injury to the harbour." There was some dispute about the fact of the jury bringing in a verdict for the defendants, the plaintiff asserting that they only found the special circumstances as indorsed, but the Judge said that they expressly found a verdict for the defendants.

*Hardinge, Cole, Graham, and Le Blanc* showed cause.—The first part of the rule is grounded on a supposed principle of law, that twenty years' continuance of the nuisance is a legal bar. This point was never taken before the third trial, though the fact appeared from the commencement of the proceedings in *Chancery*. If such a possession be a bar, the fact should have been pleaded. *Pepys's case* (b); *Brooke on the Statute of Limitations*, 80. In none of the books is it considered a bar, but only as a ground of presumption. In the case of a private way, it affords a presumption of a licence; but it is otherwise with regard to a public way, where a grant from the crown, founded upon a writ of *ad quod damnum*, and another way set out, must be presumed. In *Keymer v. Summers* (c), where a way had been used for thirty years, *Yates, J.*, said that the user of the way for all that time was sufficient to afford a presumption of a grant or licence from the party. But how can this presumption apply to the case of a harbour? Besides, here the injury has been progressive, and may not have been discovered for many years; while in the case of the way it is immediate. The finding of the jury upon this part of the case merely is, that no legal proceedings were had within twenty years from the erection of the bank. This is merely a finding of evidence, and can form no ground upon which the Court can proceed. It is for the jury to draw the conclusion from such evidence. *Mayor of Hull v. Horner* (d).

With regard to the second point, the finding of the jury

- (b) *C. B., E. 25 Eliz., 3 Leon. 80.* (d) *B. R., T. 14 Geo. 3, Cowp. 102.*  
(c) *Bull. N. P. 74.*

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is merely in consequence of the order of the Court of *Chancery*, and for the convenience of that Court. Independently of the finding, there is a distinct verdict for the defendants. But it may be admitted, for the sake of argument, that the indorsement is in the nature of a special verdict, and that the injury is immaterial. To justify the verdict for the defendants, it is enough that it is an injury. Materiality is of consequence in estimating the damages, but not in governing the verdict. Would the immateriality of a theft be a defence? Or, to a plea of a nuisance, would a replication that the nuisance is immaterial be good? A gate, not locked, across a highway, is immaterial, if any thing can be so, and yet it is a nuisance. So a house encroaching on the widest highway. It is said, in *Mary's* case (*c*), that if the trespass on a common be so small that the commoner has not any loss, he shall not have an action, but the tenant of the land shall. So the master of a servant shall not, for every small battery, have an action, but the servant himself shall. Was there ever a demurrer to an indictment for a nuisance, because "*grave*" was not added to "*nocumentum*?" The mischief in this case was progressive. A man may commit an immaterial injury every day, while the sum of the injuries will be material. The true construction of the indorsement on the *postea* is, that the injury was material enough to make a nuisance, but that jury could not agree as to the extent of the materiality.

*Mansfield*, S. G., *Partridge*, *Joddrell*, and *Sayer*, *contra*, upon the first point contended that many presumptions were applicable in this case, as well as the presumption of licence in the case of a private way; that even a record might be presumed from length of time; and that the reason why decisions on such points were not found in the books was, that the questions had arisen in modern times. Upon the second point, they argued that this was not a nuisance in itself, but only from its effects, and that therefore the cases of highways stopped up or encroached upon did not apply; that, upon this finding, it could not be said that the continuance of the bank would be a nuisance; and that, at all events, if there were any doubt on that point, there must be a new trial. It was never left to the jury, what, supposing the injury to be material, was the degree of the materiality.

(*c*) *B. R.*, *T. 10 Jac. 1*, 9 *Rep.* 113 *a.*

LORD MANSFIELD.—This cause has been tried three times. I should regret sending it to a fourth trial, and I am glad I am fully satisfied it is not necessary. The action was brought to try the legal point. The degree of materiality was not in question. If it be an injury, it is enough; but an injury is something that a jury can grasp. The judge at the last trial was justly favourable to the plaintiff. He told the jury not to go on mathematical injuries. He added, that they might consider whether the removal would be of any advantage. This they could not determine. But the indorsement, as far as an injury is found, is consistent with the report of what passed. As to the other point, the length of time is clearly not a bar, nor any thing like a bar. It is a public nuisance, which may increase every hour; and it is nobody's business to prosecute. I cannot rely much upon circuit cases, but certainly with regard to a private way there may be a presumption of a licence; and even in the case of a public way, it may be presumed never to have been a way. Every thing arising from the indorsement is for the Court of *Chancery*. The verdict must stand.

WILLES, *Justice*.—The indorsement must mean, "We are not agreed to what degree material." The point as to the twenty years is given up on the part of the plaintiff; for it is admitted to be no bar, and as evidence it was left to the jury.

BULLER, *Justice*.—The cause was tried favourably for the plaintiff. On the face of the indorsement, I see no great difficulty. It must mean the extent of the materiality. There remains the objection that the twenty years are conclusive: but length of time is neither a bar nor conclusive in any nuisance, public or private. It is evidence, but not conclusive, for conclusive evidence is a bar. There are other matters, besides licence, of which length of time may be evidence, as of there never having been a right. Still it is only evidence. It is said that it is material that this is a nuisance only from its effects; but that argument turns the other way, and distinguishes this case from that of highways. Therefore length of time is not so strongly applicable, even as evidence, in this case, as in those which have been mentioned (*f*).

Rule discharged.

(*f*) See *Vooght v. Winch, B. R. v. Montague, B. R., T. 6 G. R., T. 59 G. 3, 2 B. & A. 662; 4, 4 B. & C. 598.*

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Friday,  
28th November.

In an action on  
the stat. 9 *Anne*,  
c. 25, § 2,  
it is sufficient to  
allege in the de-  
claration that  
the defendant  
had a hare in  
his possession.

TALBOYS v. BROWN.

THIS was an action of debt on the statute 9 *Anne*, c. 25 (a), tried at *Chelmsford*, before GOULD, J. The declaration contained eight counts:—1. For buying seven hares on the 1st of *January*; 2. For having in his possession seven hares; 3. For exposing to sale seven hares; 4. For buying four hares on the 8th of *January*; 5. For having in his possession five hares; 6. For exposing to sale five hares; 7. and 8. For having in his possession five and seven hares; he being a carrier. The evidence was that the defendant was driver of the *Norwich* stage coach, and purchased and had in his possession seven hares on the 1st of *January*, and five more on the 8th of *January*. The jury found twelve penalties, and the verdict was taken on the second and fifth counts. *Peckham* having moved in arrest of judgment on the ground that having hares in possession is not itself an offence, but only evidence of an exposing to sale,

*Erskine* showed cause, and cited *Jones qui tam v. Bishop* (b).

THE COURT, on the authority of that case, held that the allegation in the second and fifth counts was sufficient. The statute providing that having a hare in possession shall be deemed an exposing to sale, it was enough to declare in the words of the statute.

Rule discharged.

(a) By sect. 2, if any hare, pheasant, partridge, moor, heath-game, or grouse shall be found in the shop, house, or possession of any person or persons whatsoever, not qualified in his own right to kill game, or being entitled thereto under some person so qualified, the same shall be adjudged, deemed, and taken to be an exposing thereof to sale within the true intent and meaning of the act.

(b) *B. R., M. 26 G. 2, Sayer*, 64.

# C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

HILARY TERM,

IN THE

TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

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SALOUCCI v. WOODMASS (a).

1784.


THIS was an action on a policy of insurance upon goods, warranted neutral, on board the *Thetis*, "a *Tuscan* ship." At the trial, before Lord MANSFIELD, at *Guildhall*, the defendant relied upon the following sentence of a *Spanish* Court of *Admiralty* as disproving the warranty of neutrality.

"*Madrid*, 24th *March*, 1781.—We declare the capture made by the privateer, Captain *Antonio Ferrer*, of the *Tuscan* frigate called the *Thetis*, Captain *Joseph Monteverdi*, with the merchandises and effects of which her cargo consists, to be good and lawful; and the whole shall be given to *Giacomo Regulus* and his associates, fitters-out of the xebec, *Santa Teresa*, commanded by the said *Ferrer*, and to the aforesaid *Monteverdi* the certificates and corresponding passports, that he may withdraw himself with his ship's crew in the usual manner; and before the publi-

Monday,  
28th January.

Where goods were insured, warranted neutral, on board the *Thetis*, "a *Tuscan* ship," and the ship and goods were captured by the *Spaniards*, and condemned as a "good and lawful capture," it was held that this sentence was conclusive evidence that the goods were not neutral.

(a) *S. C.*, but without the arguments of counsel, *Park, Ins.* 471, 6th ed.

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lication of this sentence, let his majesty be consulted. Royal resolution, as proposed; and if any of the parties choose to appeal, let it be admitted."

Lord MANSFIELD being of opinion that this sentence was conclusive, the plaintiff was nonsuited; and in *Hilary Term* last a motion was made to set aside the nonsuit, which was repeatedly enlarged in order to give time to get proceedings and papers from *Spain* and *Italy*. The papers now arriving, the motion now came on as a peremptory.

*Lee* and *Piggott* in support of the rule. There is nothing on the face of this sentence to show that the ship was condemned on the ground of its being enemy's property, and the plaintiff, therefore, ought to have been permitted to go into evidence to show the warranty of neutral property was not falsified. *Bernardi v. Motteux* (b). There is nothing on the face of this sentence to show the ground upon which the Court in *Spain* proceeded. They only condemn the ship as a lawful capture. Certainly in *Bernardi v. Motteux* there were circumstances which induced the Court to think that the foreign Court did not proceed on the ground of the ship being enemy's property. Here the sentence itself calls the *Thetis* a *Tuscan* ship, and so far supports the policy. Nothing appears to show that she was not a neutral ship, and condemned on other grounds than being enemy's property.

*Peckham, contra.*—The presumption is always that the condemnation was on the ground of enemy's property, unless the contrary appears on the face of the sentence.

Lord MANSFIELD.—This is an action on a policy upon goods warranted to be neutral property, and the ship is stated to be a *Tuscan* ship. A sentence of condemnation, as lawful prize, affords a presumption that the goods were enemy's property, unless the contrary appears on the sentence. In *Bernardi v. Motteux* there were circumstances on the face of the proceedings that showed the condemnation went on a special ground. Here, on the contrary, the proceedings show no special grounds. In order to prevent the condemnation from being conclusive, it is incumbent on the plaintiff to make out a special ground. None appears. The sentence is an inaccurate one; but it seems to have gone upon the

(b) *B. R., H. 21 G. 3, ante*, vol. ii. p. 575.

question, whether the goods were free or prize, which can only be on the ground of property. The general rule, independent of treaty, is that enemies' goods may be taken on board a neutral ship, and friends' goods are free though in an enemy's ship.

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Rule discharged (c).

(c) See *Barzillai v. Lewis*, B. G. 3, ante, p. 79; & *Saloucci v. R.*, T. 22 G. 3, ante, p. 126; *Johnson, B. R.*, H. 25 G. 3, *Mayne v. Walter, B. R.*, T. 22 post, vol. iv.

PUGH v. MARTIN (a).

Monday,  
26th January.

THIS was an action of assault tried at *Westminster*, before Lord MANSFIELD, after the last term, when a verdict was found for the plaintiff. The memorandum of the bill was of *Trinity Term* generally, and the cause of action arose within the term; but it appeared in evidence that the bill was sued out after the commencement of the term, and after the cause of action arose.

Where the cause of action arises in the term, and the memorandum of the bill is of the term generally, the plaintiff may show, in evidence, the suing out of the writ, and elect to consider it the commencement of the action.

*Peckham* moved to set aside the verdict for the plaintiff, and to enter a verdict for the defendant, and cited *Venables v. Daffe* (b). The action there was for a malicious prosecution in indicting the plaintiff for keeping a disorderly house. The declaration, which was of the term generally, stated that the plaintiff was acquitted at the sessions held on such a day. That day was within the term; and it was held that the acquittal, being the cause, or at least the consummation of the cause of action, and that not having happened till after the first day of the term, the action could not be maintained without a special memorandum.

ASHURST, *Justice*.—The repugnancy there appeared on the face of the record.

BULLER, *J.*—Even if it were not so, one case against the objection is better than twenty for it, it being merely an objection of form. There was a case (c) in which Mr. *Lucas*

(a) S. C. cited 1 *Tidd*, 144, M. 28 Car. 2, 2 Lev. 176. 8th ed. (c) See *Morris v. Pugh*, B. R., M. 2 G. 3, 2 Burr. 1241. 113. See *Dobson v. Bell*, B. R.,



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was counsel before Lord MANSFIELD, in which it was decided, that it is in the election of the plaintiff to consider the memorandum, or the actual suing out of the writ, as the commencement of the suit.

Lord MANSFIELD said, that he had so stated the rule at *Nisi Prius*, with the exception, that in penal actions, and in cases on the statute of limitations, the defendant may always resort to the real time.

Motion denied (d).

(d) See *Foster v. Bonner*, B. *Erch. Ch. H. 5 & 6 G. 4, M'Cl. R., E. 16 G. 3, Cowp. 454; 2 & Y. 202; Lester v. Jenkins, Saund. 1 (n), 5th ed.; 1 Tidd, B. R., T. 9 G. 3, 8 B. & C. 339, 144, 8th ed.; Ruston v. Owston, 2 M. & R. 429, S. C.*

Tuesday,
27th January.

ONSLOW v. SMITH and Another.

An action may be maintained under st. 1 G. 1, st. 2, c. 5, against hundredors, by the trustee in whom the property in a house of correction, belonging to the county, is vested, for the demolition of the house by rioters.

THIS was an action against the hundred, upon the statute 1 Geo. 1, st. 2, c. 5, to recover damages sustained by the demolition of certain premises pulled down by the rioters in 1780. The action was tried at the *Surrey* assizes, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated, in substance, that the premises destroyed were the house of correction, which belonged to the county, and which had been vested in trustees, of whom the plaintiff was the survivor. The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Rous, for the defendants, was directed by the Court to begin. The first objection to this action is, that the county cannot recover against the hundred, which is a part of themselves. If the case had been free from the technical embarrassment of trustees, it could not have stood a moment. But the intervention of a trustee can make no substantial difference. He is merely an instrument of conveyance, and has no interest. The remedy is given to the party damaged. But how is the trustee damaged? Where the statute meant to give persons standing in the situation of trustees a remedy, it has done so, as in the case of rectors and vicars. In framing the statute the legislature had

two objects in view:—1. To relieve individuals by throwing the loss upon a larger number of persons; and, 2. To make it the interest of the greater number to suppress the riot. If the larger body may recover, as in this case, against the smaller, it prevents the body at large from interfering to suppress the riot, and it throws the burden from the greater upon the smaller body. The second objection is, that the declaration states this to be a dwelling-house; but a house of correction is not a dwelling-house within the meaning of the act. A house may be a dwelling-house, for some purposes, and not for others. Thus a house of correction has been held not to be a dwelling-house, so as to be rateable to the window-tax. The question is one of considerable importance in this case, as there are five gaols within this district of the half hundred of *East Brixton*.

Lord MANSFIELD, stopping *Hunter*, who was to have argued for the plaintiff.—Two objections have been taken to the right of the plaintiff to recover in this action:—1. That this is not a dwelling-house within the statute; and, 2. That as this is a trust for the county, and as the county themselves could not maintain an action, the plaintiff, their trustee, cannot. I am of opinion that there is nothing in either of the objections. This is a dwelling-house, and burglary may be committed in it. As to the trust, the Court will take notice of trust, and have done so of late years in many instances. Supposing money belonging to the county is taken by robbers in a hundred—cannot the county recover against the hundred?

BULLER, *Justice*.—These houses have been held to be dwelling-houses, and persons have been indicted and convicted of setting fire to them under the statute 9 Geo. 1, c. 22. *The King v. Donovan* (a).

Judgment for the plaintiff.

(a) *B. R., E. 10 G. 3, 2 W. Blackstone, 682.*

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ONslow
v.
SMITH.

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Tuesday,
27th January.

CARSAN, Administratrix, &c. v. WATTS.

The prize-money gained by an apprentice, serving on board a letter of marque ship, does not belong to the master of the apprentice, the usage being proved to be that such money is the property of the apprentice. *ASHURST, J. dis.*

THIS was an action on the case, tried at *Lancaster* before *BULLER, J.* The declaration stated that the defendant was owner of a letter of marque called the *Kitty*, and in consideration that the intestate would serve as a mariner on board the said ship, undertook and promised to pay him a certain proportion, with the rest of the crew, in one-fourth of the produce of the prizes she should take. That the ship took a prize, and that the intestate's share amounted to £51. There was another count for the intestate's share in another prize; and also counts for work and labour, and on an account stated. The defendant pleaded the general issue: and at the trial a special case was made, which stated the pleadings; and that it was proved at the trial that the intestate served on board the *Kitty*, a letter of marque ship, as a sailor, under the agreement mentioned in the declaration; and that he went two several voyages in the said ship, which took two prizes; and that the share of each sailor on board thereof amounted to £51. 9s. The intestate was during all that time an apprentice to *William Crozier* as a mariner, who received the wages which became due to him for the two voyages, and who now claims the share of the prize-money in question.

The case was argued in *Michaelmas Term* by *Wood* for the plaintiff, and by *John Heywood* and *Wilson* for the defendant; and again in this term by *Lee* for the plaintiff, and by *Wilson* for the defendant.

Lee, for the plaintiff.—The question is, whether a person, being an apprentice, who goes to sea with his master's consent, is entitled to a share of prize-money for prizes taken, or whether the master is entitled. There appears to be only one reported case on the subject, *Hill v. Allen (a)*, where Lord *HARDWICKE* seems to have considered it an unsettled point. [*BULLER, J.*—Lord *HARDWICKE* states it as clear law that the master is entitled.] The event of the case was in favour of the apprentice; which seems to show that the point was not settled, and is still open to argument. It is an extraordinary assertion to say, that an apprentice to a

(a) 1 *Ves. sen.*, 83.

civil business, going to sea out of his master's tuition, shall earn for his master, not wages only, but prize-money, the compensation of danger and wounds. Inquiries have been made amongst the prize-agents, who say, that it is the uniform practice, as it was that of the late war, that the apprentice should have the prize-money, and the master the wages. That usage is conclusive against the master. [Mr. *T. Ward*, the agent of both parties, confirmed this account of the inquiries, made by him, at the request of the Court (*b*).] [Lord MANSFIELD.—The result of the inquiries seems extraordinary, because on board privateers there are no wages; and it appears to have been determined in a case in *Salkeld* (*c*), that on board a man-of-war the master is entitled to all the apprentice's earnings.] [BULLER, *J.*—There were wages here, and the case states that the master received them.]

Wilson, contra.—The usage at *Liverpool*, where this contract was made, and at *Bristol*, is quite uncertain, and depends upon the will of the master. The master is entitled to the service of his apprentice: the prize-money is the consideration for the service, and belongs to the master as much as the apprentice's wages. Whether the apprentice went to sea with the consent or not of the master is immaterial, if the latter afterwards ratifies the act. [Lord MANSFIELD.—Did the apprentice go to sea with the master's consent, or not?] [BULLER, *J.*—There was no evidence given on the point. I rather thought the boy went on board without the master's consent. If the boy went with the master's consent, the reason of the thing seems to be that the master shall have the wages; if he went without such consent, the master may recover a satisfaction for the loss of the service—the damages he has sustained by it in his trade—what he himself has lost, not what the apprentice may have gained. There can be no reason why he should take the large fortune his apprentice may have gained by the risk he has run.] That principle would go too far; for it would show that the master would not be entitled to wages, but only to a satisfaction for loss of service, in another way, and as something different from wages.

(*b*) The agents applied to *Note by Mr. Wilson.*
 were *Ommaney, Creed and* (*c*) *Quære Barber v. Dennis,*
Marsh, Kemble, Sykes, and *B. R., T. 2 Ann. 1 Salk. 68?*
 others, all agents for men-of-war, and not for privateers.—*But that was not the case of a*
man-of-war.

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Lee, in reply.—The principle of law does not go so far as is contended for on the other side. If the master has the benefit of his apprentice's service in the fair way of his duty as an apprentice, he is entitled to nothing further. Here he has had that benefit, but he requires something more. Would he be entitled to the earnings acquired by the apprentice at by-hours, after doing all his master's business?

ASHURST, Justice.—Suppose that, instead of prize-money, the captain of the ship had agreed to give higher wages—would not the master of the apprentice be entitled to such wages? The doubt seems to me to have arisen from the practice in king's ships, where prize-money is not earnings, but the bounty of the crown, and therefore does not go to the master. In privateers and letters of marque, prize-money is not bounty, but stipulation, and I do not see how it can be distinguished from wages.

WILLES, Justice.—I think the master is entitled to all the wages or money fairly acquired by the apprentice as for labour or service; but to any extraordinary gains he may acquire, out of the usual course of his service, I think the master not entitled. Suppose that, in case of a wreck at sea, an apprentice, by any exertion of his own, had recovered part of the wreck from a ship stranded, would the master be entitled?

LORD MANSFIELD.—It is very extraordinary that no case should have occurred since 1747. I did think it had been decided. Upon the first argument, I thought it clear that whatever an apprentice who runs away gains in another service *eo nomine* belongs to the master, and is earned for him; and that, if it is any thing specific, the master may bring trover for it (*d*). I could see no distinction, in the case of a privateer or letter of marque, between wages and prize-money which is in lieu of wages. In men-of-war there is a difference. This is not like the case of extraordinary gain, as the instance put of treasure trove, recovery of wreck, &c., for that is no remuneration of service. But I am now struck very much with the usage, and am unwilling to go against it. We must take that usage to be as stated by *Mr. Ward*, and I think it ought to decide.

(*d*) Accord. dict. per Lord *art, B. R., M. 55 Geo. 3, 3 ELLENBOROUGH, Foster v. Stew- M. & S. 198.*

BULLER, *Justice*.—Independently of statutory regulations, the prize-money is as much a bounty of the crown on board privateers as on board king's ships. There does not seem to be much difference in the case from that circumstance. The master's remedy is against the parties to the covenant in the indenture of apprenticeship. I rather incline to the opinion which I held last term, that such is the remedy, and that the apprentice is entitled to the prize-money acquired.

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Judgment for the plaintiff (c).

(c) See *Eades v. Vandeput*, 3 M. and S. 191; *Lightly v. B. R.*, M. 25 G. 3, post. *Foster Clouston, C. B.*, H. 48 Geo. 3, v. *Stewart, B. R.*, M. 55 G. 3, 1 Taunt. 112.

COX v. LISTARD.

(Reported, ante, vol. i. p. 166, note [+ 55].)

STEPHENSON v. PRICE and Another.

Tuesday,
27th January.

THIS was an action of covenant on a charter-party, by which the brig *Hope* was chartered from *London* to *Charlestown* and back again. It was agreed in the charter-party that the vessel should lie at *Charlestown* for discharging and loading forty-two days. The covenant on which the breach was assigned was, that the defendants (who were also to load her outwards) “should unload and receive the same (cargo) out of her at *Charlestown*, and then and there put on board her 100 tons of goods, certain, or as they should think proper; and that within the several days or times above limited for doing thereof, or days of demurrage thereafter mentioned.” The breach was that no goods were put on board within the time. The defendants pleaded, 1. *Non est factum*; 2. That the vessel did not lie at *Charlestown*, &c. On these two pleas issues were joined, and found for the plaintiff. They pleaded farther (after oyer of the charter-party, in which was a proviso that the “last, pleaded that the vessel never arrived in *London* on the homeward voyage, but was lost. On demurrer the plea was held bad.

In an action on a charter-party, by which the defendants covenanted to unload and receive the cargo at *Charlestown*, and then and there put on board 100 tons of goods, &c. the plaintiffs assigned as a breach that no goods were put on board. The defendants after oyer of the charter-party, in which there was a proviso, that the freight of the homeward cargo should be paid on delivery at *London*,

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mentioned freight (from *Charlestown*) shall be paid, one-half thereof on the true delivery of the said homeward cargo at *London*, and the remaining half by a good bill or bills payable in three months from thence next following).” That the said vessel never did arrive at *London* on the homeward voyage from *Charlestown*, but was lost at sea, whereby the plaintiff lost the freight of the said homeward voyage. To this plea there was a demurrer.

Russell, in support of the demurrer. This action is not brought for the freight, but for not loading the ship. The cause of action accrued when the time for loading expired, and cannot be divested by a subsequent contingent event.

Bond, contra.—The claim of the plaintiff is for freight on the homeward bound cargo, which was only payable on the ship’s arrival here.

Lord MANSFIELD.—That is no answer. The action is for not loading. You have broken your covenant, and there must be

Judgment for the plaintiff.

Wednesday,
28th January.

VALLE v. GARDINER (a).

Action on a charter-party for not loading a ship. The defendant (being under terms to plead issuably) pleaded that a survey of the ship was had, by order of the Admiralty Court of *St. Kitts*, and she was declared insufficient; wherefore, &c. Held that this was not an issuable plea, and that the plaintiff might sign judgment.

ACTION on a charter-party for not loading a ship. The defendant pleaded several pleas, one of which was that a survey of the ship was had by order of the *Admiralty Court of St. Kitts*, and she was declared insufficient, and therefore he did not load her. This plea was pleaded after time given by a judge’s order on terms of pleading issuably. The plaintiff, thinking the plea not issuable, signed judgment, which *Glanville* moved to set aside, on the ground that the plea was issuable, and that if it were not, the plaintiff was not at liberty to enter up judgment, but should have demurred.

Cowper and *Russell* showed cause.

BULLER, J., said the plea was clearly not an issuable plea within the meaning of the order. It was only evidence, and if the plaintiff had taken issue, it could only have been on the fact of the condemnation, and he would have had no

(a) *S. C.* cited *Tidd*, 477, 8th ed.

opportunity of entering into the merits of it. The plea ought certainly to have been that the ship *was* insufficient. The plaintiff might have demurred to the plea, if he had chosen it, but he was also at liberty to exercise his own judgment concerning it, and to sign judgment, but he did it at his peril. If he might not do so the effect of these orders would be lost. They were made to prevent delay, and usually, at the end of a term, and if a demurrer were necessary, the delay would be obtained.

The plaintiff's attorney, however, being willing to wave his judgment, and the writ of inquiry which had been executed, the rule was made absolute on payment of costs, giving judgment of the term, and undertaking not to bring a writ of error.

Rule absolute.

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THE KING v. UTLEY.

(Reported, Caldecott, 389.)

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SPARKE v. STOKES, one, &c. (a).

Saturday,
31st January.

LE BLANC moved to change the venue in this action to *Middlesex*, on the ground that the defendant, being an attorney, had the privilege of being sued, as well as of suing, in that county, for which he cited *Wigley v. Morgan* (b); but the Court said that it was constantly refused, and denied the motion (c).

An attorney when sued has not the privilege of changing the venue to *Middlesex*.

(a) S. C. cited *Tidd's Pr.* 76, 8th ed.

(b) *B. R., T. 9 G. 2, 2 Str.* 1049.

(c) Accord *Pope v. Redfearne, B. R., H. 7 G. 3, 4 Burr.* 2027; *Yeardley v. Roe, B. R., H. 30 G. 3, 3 T. R.* 573.

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Saturday;
31st January.

HALL and Another, Assignees of PHYNN, a Bankrupt, v.
GURNEY (a).

The owner of the major part of a vessel then lying in port mortgaged it, and transferred the grand bill of sale to the mortgagees. The mortgagees did not take possession, but suffered the mortgagor and the other part owners to have the management, and act as the visible owners of the vessel. The mortgagor having become bankrupt, held that his share in the vessel passed to his assignees, under the statute 21 Jac. 1, c. 19.

THIS was an action for money had and received by the defendant to the use of the plaintiffs, as assignees, tried after last term, before Lord MANSFIELD, at *Guildhall*, when a verdict was found for the plaintiff with £534. 7s. 6d. damages, subject to the opinion of the Court on the following case.

The bankrupt, *Walter Phynn*, was owner of nineteen thirty-second parts of the vessel called the *Friendship*, and by indenture, dated the 4th *July*, 1777, and made between the said *W. Phynn*, owner of the major part of the brigantine, the *Friendship of Yarmouth*, whereof *John Ranet* was then master, of the one part, and *John and Bartlet Gurney*, bankers, of the other part, after reciting that the said *J. and B. Gurney* had, on the date thereof, paid and lent unto the said *W. Phynn* £400, which they were contented to stand to, and bear the hazard and adventure of on the hull of the said vessel, upon such voyage and voyages as the said *W. Phynn*, his executors, administrators, and assigns, should think fit to make with her, and upon the terms after mentioned: it is witnessed that in consideration of £400 unto the said *W. Phynn*, lent and paid by the said *J. and B. Gurney*, the said *W. Phynn* did grant, bargain, and sell, unto the said *J. and B. Gurney*, their, &c. all that the aforesaid brigantine, called the *Friendship of Yarmouth*, of the burden of 140 tons or thereabouts, and all the anchors, &c. to hold, &c. as their own goods and chattels. Proviso that if the said *W. Phynn*, his, &c. should pay unto the said *J. and B. Gurney*, their, &c. £400 within six calendar months next after they should give notice in writing for that purpose to the said *W. Phynn*, his, &c.; but such notice not to be given till six months after the date thereof (unless an utter and total loss of the said brigantine by the seas, &c. should, in the meantime, happen); and also if the said *W. Phynn*, his, &c. should pay unto the said *J. and*

(a) *S. C., Co. B. L.* 231, 1st ed. 353, 8th ed., shortly reported without the arguments of counsel.

B. Gurney half yearly, from the date hereof, for so long time as there should not be an utter or total loss of the said brigantine by the seas, &c. and the principal sum should remain unpaid, the sum of £26, as and for the interest and premium for the hazard of the same principal money, then the grant and assignment thereby made should be void. Declaration by all the parties that the principal sum of £400 should not be due or paid until six months' calendar notice should have been given by one of the parties unto the other for payment thereof; and also that in case default should be made in payment of the said £400 and interest, or any part thereof, or in the performance of the proviso before contained, it should be lawful for the said *J. and B. Gurney*, or either of them, upon the said brigantine to enter, and the same, with all her materials, to dispose of by public or private sale, without any interruption, &c.; and also that in case there should happen an utter and total loss of the said brigantine before the said principal money should be payable by the said indenture, then the payment thereof should not be demanded or recoverable by the said *J. and B. Gurney*, but the loss thereof should be borne by them; nevertheless the premium should be paid to the date of the said loss. At the time of making the said indenture the brigantine was at *Yarmouth*, and the grand bill of sale was delivered to the defendant. *W. Phynn* and the other part owners of the brigantine had the management, and appeared and acted as the visible owners of her, from the time of the assignment to the defendant to the bankruptcy of *W. Phynn*, which happened on the 13th of *June*, 1782. The defendant and the solvent owners sold the brigantine at *Bristol*, on the 29th of *January*, 1783, and recovered the purchase money.

The question for the opinion of the Court is, whether the defendant is entitled to retain so much of *W. Phynn's* share of the money arising from the sale, as will be sufficient to discharge the principal and interest due on the assignment.

The case was argued in *Michaelmas Term*, by *Touchet* for the plaintiffs, and *Wood* for the defendant.

Touchet for the plaintiffs.—The question depends entirely on the construction of the statute 21 *Jac.* 1, c. 19. For a long period after the passing of that act, no question arose upon it. "I do not remember," says Lord *HARDWICKE*,

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"in this Court, or while I sate in another, that the construction of these clauses was ever made a point in any case (b)". The statute was much considered in the case of *Ryall v. Rolle* (c), which has governed this head of law ever since, and is exactly this case. The same doctrine was maintained in *Worsley v. Demattos* (d). Here the bankrupt continued in possession of the ship for five years after the mortgage, and the case comes precisely within the words of Lord MANSFIELD in the latter case. "If he mortgages, and parts with the possession of goods, the world has notice; but to give priority from mortgaging goods, of which the trader is allowed to appear and act as the owner, would be enabling him to impose on mankind, and draw them in by false appearances." So in *Ex parte Matthews* (e), it was held that if the mortgagee takes all the means in his power to get possession, his title will be good against the assignees; but if he were to suffer the ship to come back, and to go on another voyage, the case would be very different; for that the delivering of the grand bill of sale would not be sufficient, if there was an opportunity of taking possession. In the present case the vessel was in harbour at the time of the mortgage, and possession might therefore have been demanded and obtained.

It may perhaps be said that this resembles the case of bottomry; but that power of hypothecation exists only in the master in foreign parts from necessity, and not in the owners; nor could that right prevail against the express provisions of an act of parliament.

The case of *Stephens v. Sole* (f) is in point for the plaintiffs. [Lord MANSFIELD.—I wish to see that case from the Register's book.] The decree in that case has been examined. [Lord MANSFIELD.—Was the grand bill of sale delivered in that case?] It appears that the *bill of sale* was delivered. [Lord MANSFIELD.—That means the bill of sale made by the bankrupt.] The principle is, that when a mortgagee does not take possession, he waives his lien, and is content with the general security. The statute of *James* supposes a good consideration between the bankrupt and the mortgagee; but makes possession sufficient to entitle the

(b) *Bourne v. Dodson*, 1 *Atk.* Burr. 467.

156.

(c) 2 *Ves. sen.* 272.

(d) 1 *Atk.* 165; 1 *Ves. sen.* 348.

(e) Cited 1 *Atk.* 157; 1 *Ves.*

(f) *B. R., H.* 31 G. 2, 1 *sen.* 352.

assignees. It does not intrust the jury with the question of fraud. In a case of *Crowther and others, Assignees, &c. v. Assignees of Case (g)*, it was held that where a ship at sea was mortgaged, and the policies and bills of lading delivered, it was good, because every thing was done that could be done. There Lord THURLOW said it was good, as long as the vessel continued at sea.

Wood, contra.—On the construction of the act of parliament, the defendant is entitled to retain the money arising from the sale. Both the clause itself, and the preamble to it, show that it was not intended to extend to the case of a mortgage; and of that opinion Lord HARDWICKE appears to have been in the case of *Bourne v. Dodson*, where he says, that *Stephens v. Sole* was decided on particular circumstances. *Ex parte Matthews* is an authority in favour of the defendant, for here the grand bill of sale was delivered, which is the only muniment. The doctrine contended for on the other side would put an end to the mortgage of ships by way of bottomry; for the possession of the ship always remains in the mortgagor, and is the only thing which enables him to pay the interest. Here there never was a time when the mortgagor could take possession according to the tenor of the deed, for possession was only to be delivered on default of payment on notice. The mortgagor had not the order and disposition of the vessel within the intent of the statute, for not having the grand bill of sale, he could not dispose of the ship. *Walker v. Burnell (h)*.

Touchet, in reply.—The preamble of the clause shows that this case was intended to be included, “for that it often falls out that many persons, before they become bankrupts, do convey their goods to other men upon good consideration, and yet still do keep the same,” &c. It was therefore the mischief of the bankrupt continuing in possession that was intended to be guarded against. This mortgagor certainly acted as owner, for he made charter-parties, &c. *Bourne v. Dodson* is not inconsistent with the present case, for the mortgage is good while the vessel remains at sea. Besides, that case never received a decision. There can now be no doubt that mortgages are within the statute, for *Stephen v. Sole* is recognized in *Ryall v. Rolle*. As to in-

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(g) *Semble, Falkner v. Case*, more full, 2 T. R. 491.
Canc. 1781, 1 Br. C. C. 125; (h) *Ante*, vol. i. p. 317.

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convenience, that argument was considered in *Ryall v. Rolle*. There may be some on both sides, but it is for the legislature, and not for this Court, to provide a remedy.

Cur. ad. vult.

Lord MANSFIELD now delivered the judgment of the Court. The single question in this case was, whether the transaction was within the statute 21 Jac. 1, c. 19. It has been determined in several cases, that the mortgage of a ship at sea, with a delivery of the grand bill of sale, is not within the statute; and on the argument I was much inclined to regard this in the same light as a mortgage of landed property. But the case of *Stephens v. Sole* was mentioned, and on inquiry it appeared that there the grand bill of sale was delivered to the mortgagee, the bankrupt keeping possession. We look on that case as an authority, and there must therefore be

Judgment for the plaintiffs (i).

(i) This case was cited in *Atkinson v. Maling*, B. R., E. 28 G. 3, 2 T. R. 462, where the mortgage was held good, the grand bill of sale being transferred, and the mortgagee taking possession as soon as the ship returned to port. See also *Ex parte Batson*, Canc. 1791, 1 Co. B. L. 355, 8th ed. But where on the return of the vessel to port the mortgagee neglected to take possession, it was held that the ship passed to the assignees of the mortgagor. *Mair v. Glenzie*, B. R., T. 55 G. 3, 4 M. & S. 240. The register acts will not prevent a ship, the convey-

ance of which has been executed in pursuance of those statutes, from passing to the assignees of the mortgagor, if left in his possession, &c. *Robinson v. Macdonnell*, B. R., T. 56 G. 3, 5 M. & S. 228; *Hay v. Fairbairn*, B. R., M. 59 G. 3, 2 B. & A. 193, 2 B. & B. 114, S. C. on error. See also *Kirkley v. Hodgson*, B. R., E. 4 G. 4, 1 B. & C. 588; *Robinson v. Macdonnell*, B. R., M. 59 G. 3, 2 B. & A. 134. As to the transfer of part of a ship only, see *Addis v. Baker*, Scacc. T. 33 G. 3, 1 Anstr. 222; *Gillespie v. Coutts*, Amb. 652. *Abbott on Shipp*. 13, 5th ed.

Tuesday,
3d February.

JOHNSON v. SPILLER.

(Reported ante, vol. i. p. 166, note [† 55.])

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HASSELLS and Another, Assignees of Jackson, a Bankrupt,
v. SIMPSON.

Tuesday,
3d February.

(*Reported, ante*, vol. i. p. 89, note [† 39.])



GOODLITTLE dem. BAILEY v. PUGH.

Tuesday,
3d February.

(*Reported, Fearn, Cont. Rem.* 573, 7th ed.)



PISTOL, on the demise of W. R. F. RICCARDSON RANDAL,
Esq. v. SARAH RICCARDSON, Widow (a).

Friday,
6th February.

THIS was an action of ejectment for two farms in *Cumberland*, tried at *Carlisle*, before BULLER, *Justice*. The case reserved stated, That the testator, *Christopher Randal Riccardson*, was seised in fee of a freehold estate in *Cumberland*, worth £136 per annum; another in *Northumberland*, of £14; and another in *Westmoreland*, of £2. 10s., but was not seised in fee of any estate in the county of *York*. Of these estates, the lessor of the plaintiff, who is the only son of the testator, is in possession under the will. The testator was also seised of a copyhold of inheritance in the manor of *Great Salkeld*, worth £62 per annum, which he had not surrendered to the uses of his will; and of another copyhold of inheritance in the manor of *Onsby*, worth £66 per annum, which estates are not demiseable. Of these copyholds the lessor of the plaintiff is in possession as heir-at-law of the testator. The testator was also tenant for life of freehold and copyhold estates in *Cumberland*, *Northumberland*, and *York*, worth £292, which, on his marriage, were settled on the defendant for her jointure, and in which the lessor of the plaintiff has a remainder in tail male. By the same settlement, £2000 was vested in trustees for younger

Testator being seised of freehold lands, and possessed of leasehold lands for the remainder of a term of 1000 years, devised "all his manors, advowson, donation rights of patronage and presentation, and all and every his several lands, tenements, and hereditaments whatsoever and wheresoever, whereof he was seised of, interested in, or entitled to, &c." Held that under this devise the leaseholds did not pass.

(a) Short note of *S. C.* 1 *H. B. C.* 26 (n), 2 *Cox's P. Wms.* 459 (n).

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children, which, on the death of the defendant, will go to *Sarah Ann Riccardson*, the testator's only daughter. The defendant is also entitled, under the will, to a freehold estate in *Cumberland* of £25 per annum during her widowhood.

The testator was also possessed of the two farms in question, which are leasehold, and held for the remainder of two long terms of 1000 years, of which more than 800 years are unexpired, except a small part of one of these farms, which is freehold, and belongs to the lessor of the plaintiff, and is not in dispute. On the 5th November, 1778, the testator made his will as follows: "I do give, bequeath, and devise, *all my manors, advowson, donation, right of patronage and presentation, and all and every of my several messuages, lands, tenements, and hereditaments, whatsoever, wheresoever, whereof I am seised of, interested in, or entitled unto, lying and being within the several counties of Northumberland, Cumberland, Westmoreland, and in the East Riding of the county of York*, to my only son, for and during the term of his natural life, with impeachment for all wilful waste; and, from and after his decease, the same to descend and go to the heirs of his body, lawfully begotten, they and each of them, bearing our arms, and always using the name of *Randal* with their surname; and, in default of such issue by my only son," then a limitation, in like manner, to his daughter. He then gives a house, and some land round it, to his wife, the defendant, during her widowhood; "and I do hereby nominate, constitute, and appoint, my said dear wife guardian and sole tutor of my children, till they arrive at their respective ages of twenty-one; and I also appoint her sole executrix to this my last will and testament, upon this trust and confidence, that she will take proper care of my personal estate, as well as real, till my son arrives at the age of twenty-one. And it is my desire that my said wife shall give to my daughter two full thirds, at least, of my personal estate, one-third being enough, and too much, for my son, who will take lands sufficient for life."

The testator died in *March*, 1780, leaving the defendant, his widow, and the lessor of the plaintiff and *Sarah Ann Riccardson*, his only children, and leaving a personal estate of the value of £1650.

The question for the opinion of the Court was, whether, under the will of *Christopher Randal Riccardson*, the leasehold as well as the freehold estates passed.

The case was argued in *Michaelmas Term* by *Wilson* for the plaintiff, and by *Lambe* for the defendant.

Wilson, for the plaintiff.—The words of the devise are very extensive, and will pass leaseholds as well as freeholds—all that he was “seised of, interested in, or entitled unto.” Surely the testator had an interest in land in which he had a term for 1000 years. It is true that it has been held, in some old cases, that by the words “all my lands and tenements,” where these are both freehold and leasehold, the freehold only will pass. The case of *Mortimer v. Mortimer* (b) is in point. There the testator devised “all lands and tenements whatsoever whereof he was seised and possessed,” and the *Chancellor* held that leaseholds as well as freeholds passed. If it should be said that the testator, by using the words “the same to descend to the heirs of his body,” &c. has shown that he intended the freeholds only to pass, it may be replied that those words only prove that he was ignorant of the laws of descent.

Lambe, contra.—The objects of the testator’s bounty were three: his wife, his son, and his daughter. The son was provided for, but the daughter, during the life of her mother, was wholly unprovided for. The leasehold, therefore, was meant as a provision for her. General words, in a will, may be restrained by the context: “all he is interested in” may relate to lands in which he has an equitable interest. In *Mortimer v. Mortimer*, the testator used the word *possessed*, which is peculiarly applicable to leasehold interests. The distinction is well established, that where the testator has both freehold and leasehold lands so situated, that both may be meant by the will, and uses general words, the freeholds alone will pass. *Rose v. Bartlet* (c), *Day v. Trigg* (d), *Davis v. Gibbs* (e), *Knotsford v. Gardiner* (f). [Lord MANSFIELD.—In all those

- (b) *Canc. E.* 5 G. 2.
- (c) *B. R.*, T. 7 Car. 1 Cro. Car. 292.
- (d) *Canc. M.* 1715, 1 P. Wms. 286.
- (e) *Canc. Hil. Vac.* 1729, 3 P. Wms. 26. This case was ori-

ginally decided at the *Rolls*, *Fitzg.* 116. It then came on before the Lord *Chancellor* on appeal, and was ultimately carried to the House of Lords.

(f) 2 *Atk.* 450.

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cases the leases were common leases.] In *Rose v. Bartlet*, the lease was for 100 years.

*Wilson*, in reply, contended that, in the old cases, the leases were of inconsiderable terms, as was then usual, and that the reasoning could not apply to a lease for 1000 years, which was, in fact, the whole interest; that the case of *Davis v. Gibbs* turned on the use of the words "real estate," which did not comprehend leaseholds; and that in *Day v. Trigg*, the leasehold was held to pass, although the devise was of freehold houses.

On the following day, Lord MANSFIELD stated, that the Court had looked into the cases, but were unable to get over that of *Davis v. Gibbs*; that they had strong inclinations the other way, especially as this was a term for 1000 years, but that they considered themselves bound by that case which had been taken up to the *House of Lords*. They were therefore of opinion that there must be judgment for the defendant.

On a subsequent day, his lordship added, that the Court had again examined the cases; that there was a particularity in the case of *Davis v. Gibbs*; that the case in *Atkins* was very shortly reported; and that the Court was desirous that the case should be again argued, and a better note furnished of the case of *Knotsford v. Gardiner*.

Accordingly, in this term, the case was argued by *Lee* for the lessor of the plaintiff, and by *Arden*, S. G., for the defendant.

*Lee*, for the plaintiff.—The question is, whether, under the words in the will, the leasehold farms pass? The only decision directly in point is the case of *Rose v. Bartlet*, which is cited in many books, and was referred to *arguendo* by Lord MANSFIELD in *Knotsford v. Gardiner*. The principle is, that fee-simple lands only, and not leaseholds, pass by a devise of "lands and tenements." In a will no technical words are necessary; thus a fee will pass without the word *heirs*. The rule laid down in *Rose v. Bartlet*, supposing it to be well established, must yield where it contradicts the intention of the testator, as collected from the whole will. But that rule has not been recognized. In *Davis v. Gibbs*, the Court proceeded on the ground that there was another clause in the will by which the testatrix disposed of her personal estate, mortgages, and credits. In

the present case the leaseholds come clearly within the words of the will. The testator uses the words *give* and *bequeath*, which are properly applicable to personal property, as well as the word *devise*, which is applicable to real property. He also uses the word *interested*, as well as *seised*. Where the words of the will are ambiguous, the presumption is in favour of the personal representative; but where, as in this case, the intention of the testator can be collected, that presumption will not operate.

*Arden, S. G., contra.*—Whatever might have been the construction of this will, had the question been *res integra*, the Court will hold themselves bound by the authorities. It is not in every case that the intention of the testator will be held to govern. A devise of “all my land” confers only a life estate, though the Court may feel assured, that the testator intended to give the fee. If a man has two houses, one in fee, and the other for a term of 1000 years, and devises “both his houses,” the devisee will take an estate for life in the one, and the whole term in the other; yet it cannot be doubted that this is a flagrant violation of the testator’s intention. But it is better that a general rule should be established, though, in particular instances, the intention of the parties should be defeated. With regard to the authorities, *Rose v. Bartlet*, and *Knotsford v. Gardiner*, are clearly in point; and if *Davis v. Gibbs* is not an authority for the defendant, it is not against her. *Matthews v. Matthews* is certainly in favour of the plaintiff; but the case was cited from Mr. *Joddrell’s* notes, who was then a very young man, and it was not mentioned in *Knotsford v. Gardiner*.

At the conclusion of the argument, Lord MANSFIELD expressed a desire to be furnished with some further information respecting the cases of *Mortimer v. Mortimer* and *Knotsford v. Gardiner*; and, a few days afterwards, Mr. Justice BULLER read Mr. Justice CLIVE’s note of the former case, from which it appeared that this was not the principal question, but that the words of Lord KING had been very accurately given in Mr. *Joddrell’s* note. The case was, that the testator had only one freehold house, but that he mentioned other lands in the devise. That case, therefore, was perfectly clear of the present, the intent there being manifest. The Court directed the case to stand over,

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in order that they might look into a case which had not been cited at the bar, *Turner v. Husler* (g).

Lord MANSFIELD now delivered the judgment of the Court. After stating the case, his Lordship proceeded as follows: "I have stated the whole of the case, to show that no argument can be drawn except from the devise itself. The words are sufficiently comprehensive to take in every thing; but the subject-matter of the devise is land. If we were left to conjecture, I should imagine that the testator did not know the distinction between freehold and leasehold, and that, if he had, he would have directed the latter to go with the former. But the question is, whether we are not precluded by authority from going into arguments at large on the intention of the testator?"

The general rule undoubtedly is, that the testator's intent, if manifest from the will, however expressed, shall prevail; and hence it has been often said to be a sort of paradox to cite cases on wills. Notwithstanding, there has been for ages a system of legal construction established on the subject of devises, by which, where a certain form of words is used, a construction is put upon that form, and adhered to for the sake of certainty. Where it is said that the intent shall govern, it must be understood that the intent is not to be collected from conjecture, but from the whole will taken together; and if the whole taken together manifests a certain intent, the Court cannot doubt—that intent must govern. But when, by the authorities, a certain construction has been established, the Court is equally bound, in cases exactly similar, to adhere to that construction. In illustration of this doctrine, the case of after-purchased lands may be mentioned. It was a probable argument, at first, to contend that such lands passed by a will executed before their acquisition, for the will speaks at the time of the testator's death. By the Roman law, also, after-purchased lands passed: other reasons might have been urged; but, on the other side, it was said that a will, in this respect, resembled a conveyance; and that argument prevailed (h).

(g) *Canc.* 1780, 1 *Br. C. C.* 78.

(h) This argument is made use of by Lord MANSFIELD in *Windham v. Chetwynd*, *B. R.*, *M.* 31 *G.* 2, 1 *Burr.* 429. See

also Mr. Justice BLACKSTONE's argument in *Perrin v. Blake*, *Hargr. Law Tracts*, 502; *Gillb. Devises*, 122, 1st ed.; *Preston's Shep. Touch.* 438 (n).

It might as well have been decided the other way, but the doctrine cannot now be shaken. So the question of the want of words of inheritance in a will was probably settled from analogy to a conveyance. Much might have been said there, but it is now determined. It was a narrow construction, and defeats the intent of the testator, but it would work great mischief to overturn it. Again, a limitation to a man for life, and afterwards to the heirs of his body, gives an estate tail executed in him; yet who can doubt that the testator merely intended to give him a life estate?

Here the testator has freehold, leasehold, and personal estate, and gives his lands one way, and his personal estate another. There is a great distinction between real and personal estate. They have a different course of devolution. At first there might be an argument whether land does not mean real estate, in opposition to personalty. If that has been decided and adopted in *Westminster-Hall*, it is convenient that the doctrine should be adhered to.

The single question then is, does such an authority exist? That authority is found in the case of *Rose v. Bartlet*. There all the Justices, with the exception of RICHARDSON, who was absent, resolved, "That if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years; but that if a man hath a lease for years, and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void." Then how has this authority been received in *Westminster-Hall*? In *Day v. Trigg*, and in *Davis v. Gibbs*, the whole argument goes upon it. The next case is that of *Mortimer v. Mortimer*. It was at first cited from Mr. Joddrell's note, which, as a statement of the case, is not accurate; but Mr. Justice BULLER has found a note of the same case, by Mr. Justice CLIVE, and it appears from the will itself, that it was not within the rule. In 1742, the case of *Knotsford v. Gardiner* occurred, and there both sides admitted the rule. The doubt was, whether there was any freehold, and an issue was directed, which would have been unnecessary if *Rose v. Bartlet* had been overruled. Another case was thought of, but it does not apply; nor, upon inquiry, does that before Mr. Baron EYRE, sitting for

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the Lord Chancellor (i). These are all the authorities; they all admit *Rose v. Bartlet*, and we think ourselves bound by that decision.

Postea to the defendant (k).

(i) *Turner v. Husler*, 1 Br. C. C. 78. See the observations of EYRE, B. in that case upon *Rose v. Bartlet*, and *Addis v. Clement*.

(k) It is singular that in the argument of this case no notice should have been taken of the case of *Addis v. Clement*, *Canc. E.* 1728, 2 P. Wms. 456, in which the words of the devise were, "all his messuages, lands, and tenements in the parish of D., which he then stood seised or possessed of, or in any ways interested in;" and the Chancellor held that they passed not only the testator's freehold lands, but also a renewable lease for 21 years, held of the church of *Hereford*. The decision appears, however, to have turned in some measure upon the peculiar nature of the leasehold interest: "As this lease," said the Lord Chancellor, "was held of the church, and always renewable, the testator might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance, and therefore the leasehold premises ought, I think, to pass by the will." He also distinguished the case from *Rose v. Bartlet*, where the words *possessed of* and *interested in*, were not to be found. A few years after the decision of the principal case, a question arose as to the effect of similar words in a release, when it was held by the Court of *Common Pleas*, that under the words "all lands or meadows to the said mill, &c. belonging or used, &c. as part

thereof," leasehold as well as freehold lands passed, on the ground that, in a deed, the words shall be construed most strongly against the grantor. *Doc dem. Davies v. Williams*, C. B., T. 28 G. 3, 1 H. Bl. 25. This case was followed by that of *Lane v. Lord Stanhope*, B. R., T. 35 G. 3, 6 T. R. 345, where it was held, that the words "all my manors, messuages, or tenements, houses, farms, lands, woodlands, hereditaments, and real estate whatsoever," passed a renewable church lease for 21 years, as well as the freehold lands. The Court relied in a great degree upon the introduction of the word *farms*, (see 9 *East*, 448). In remarking upon the case of *Pistol dem. Randal v. Riccardson*, Lord KENYON said, "I do not wonder that this Court determined the case of *Pistol v. Riccardson* with reluctance; for it appears that that case came before the Court at several different times. I only lament that the case of *Addis v. Clement* was not then cited, for Lord MANSFIELD seemed to think himself pressed by a torrent of authorities to decide contrary to his better judgment; and I cannot forbear thinking that if *Addis v. Clement* had been then mentioned, the Court would have decided the other way with less reluctance." In these observations GROSE, J., coincided, but LAWRENCE, J., remarked that the case was not contrary to, but reconcilable with *Addis v. Clement*, for that the latter con-

tained the words, "or possessed of," which are properly more applicable to leaseholds than to freeholds. The authority of the rule in *Rose v. Bartlet*, which had suffered so much in *Lane v. Lord Stanhope*, was again established in *Thompson v. Lady Lawley*, C. B., M. 41 G. 3, 2 Bos. & Pul. 303, where it was held, that under a general devise of all manors, messuages, lands, tenements, and hereditaments, leasehold messuages would not pass, unless it appeared to be the evident intent of the testator that they should pass. Lord ELDON, C. J., in delivering his judgment, said, "This was followed by the case of *Pistol v. Riccardson*, which appears to me to be a case of great authority. Lord MANSFIELD was very unwilling to come to the decision which he ultimately did. The case was argued twice before him. It has been supposed indeed that his Lordship was not aware of the case of *Addis v. Clement*. Whether his Lordship would have come to a different determination had the case of *Addis v. Clement* been cited, or whether a distinction so satisfactory as to be confidently acted upon, is to be found between the two cases, I do not feel myself bound to examine; but it does not ap-

pear to me that any very useful purpose would have been served by a contrary decision, considering how short a time even in that case the freehold and leasehold estates would probably have gone together." The same learned Judge, when *Chancellor*, again recognized the case of *Pistol dem. Randal v. Riccardson*. "As to what Lord KENYON says upon that case, supposing that Lord MANSFIELD's opinion would have been different if *Addis v. Clement* had been adverted to, I am not quite sure of that. I should not have followed *Addis v. Clement*." *Watkins v. Lea*, Canc. 1802, 6 Ves. 641.

Many cases have arisen in equity as to the passing of copyholds under general words, in which the doctrine in *Rose v. Bartlet* has been incidentally considered. See *Lindopp v. Eborall*, 1790, 3 Br. C. C. 188; *Watkins v. Lea*, 1802, 6 Ves. 633; *Blunt v. Clüherow*, 1805, 10 Ves. 589; *Church v. Mundy*, 1808, 15 Ves. 396; *Hodgson v. Merest*, 1821, 9 Price, 556. See also *Doe dem. Belasyse v. Lucan*, B. R., E. 48 G. 3, 9 East, 448.

That leases for *lives* are not within the rule laid down in *Rose v. Bartlet*, see *Watkins v. Lea*, 6 Ves. 642; *Fitzroy v. Howard*, 3 Russ. 225.

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Tuesday,
3d February.

BROWN v. PHEPOE (a).

Affidavit of debt
by third person,
that defendant is
justly indebted
to the plaintiff
in certain sums,
and that the de-
ponent is more
strongly and
better assured
that the said
sums of money
are due, by
means of depo-
nent's having
transmitted to
him and in his
custody certain
documents.
Held insuf-
ficient.

BOWER moved to discharge the defendant, on account of the insufficiency of the affidavit to hold to bail, which was as follows: "That it appeared to the deponent, and he verily believes, that the defendant is justly indebted to *B. Brown, of Charlestown, South Carolina*, this deponent's brother, in, &c., so much for sugar shipped by plaintiff, and received by defendant;—so much for interest thereon;—so much for part purchase-money of a house and land sold by defendant, under a letter of attorney, for plaintiff, and received by defendant; and this deponent saith, he is the more strongly and better assured that the said sums of money are due from defendant to plaintiff, as aforesaid, by means of this deponent's having transmitted to him, and in his custody, an authenticated copy of the original letter of attorney, made by plaintiff to defendant as aforesaid, and authenticated copies of the conveyances executed by defendant to the purchaser, certified to be copies under the seal of *S. Carolina*; and also by defendant having, in his custody, an affidavit of *R. Stewart of Charlestown*, certified, &c. of the payment of the money aforesaid to defendant; and also by means of a letter of attorney, lately transmitted from plaintiff to defendant, empowering him to sue defendant, &c.; whereby this deponent is fully satisfied that defendant did not account for and pay to plaintiff the said several sums of money by defendant received for plaintiff's use as aforesaid." *Bower* having cited *Pomp v. Ludvigson* (b) in support of his application,

Law showed cause in the first instance, and said that the affidavit in this case was different from that in the case cited, for it was positive as to belief, and only added as a confirmation that the deponent had seen certain documents.

Lord **MANSFIELD** said, that, in the case of executors, a positive affidavit was dispensed with, notwithstanding the words of the act, because it was impossible that they could

(a) *S. C.* cited 1 *Tidd's Pr.*
182, 8th ed.

(b) *B. R., M.* 32 *G.* 2, 2
Burr. 655.

swear positively; but in the case of debts owing to persons abroad, as here, another mode was open by application to a judge at chambers, who would receive an affidavit made abroad.

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Rule granted (c).

(c) See *Bovara v. Besesti, B. Tidd's Pr.* 182, 8th ed. R., M. 24 G. 3, ante.

JOHNSON v. SPILLER.

(Reported, ante, vol. i. p. 166. (n)).

Tuesday,
3d February.

BARWELL v. ANNE BROOKS (a).

Wednesday,
4th February.

THIS was an action for victuals, drink, and other necessities furnished to the defendant. The declaration also contained a count for goods sold and delivered, and the other common counts. The defendant pleaded her coverture in bar. Replication that the said *Anne*, and the said *James* her husband, long before the promises in the declaration mentioned, and before the exhibiting of the plaintiff's bill, viz. on the 18th of *June*, 1778, were parted and separated, and lived separate and apart from each other, and always from thence until the exhibiting of the plaintiff's bill, did, and still do, live separate and apart from each other; and the said *Anne*, during all that time, had a competent separate maintenance and provision allowed her by her said husband, and duly paid to her for her separate support and maintenance; and that the said *Anne*, during that time, made the said promises and undertakings in the declaration mentioned, for necessities found and supplied by the said plaintiff for the said *Anne* upon her own account and credit, and for her own separate support and maintenance. To this replication the defendant demurred generally.

A feme covert living separate from her husband, and having a competent separate maintenance duly paid to her, may be sued alone on a contract made by her for necessities.

Law, in support of the demurrer.—The maintenance here is not stated to have been secured by deed as in *Lady*

(a) *S. C. Co. B. L.*, 28, 1st ed., the arguments of counsel, shortly reported without

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Lanesborough's case (b). It may be a mere temporary precarious allowance, liable to be resumed at the will of the husband. Nor is it stated that the husband is out of the realm, or not subject to the process of the Court. No case can be cited in which a married woman has been held liable, where the husband was amenable to the process of the Court. There are two grounds upon which this demurrer may be supported:—1. That this does not appear to be such a maintenance as the creditors can get at, or the wife compel the payment of; 2. That the husband himself is amenable. [BULLER, J.—Should you not have taken issue on the maintenance not being sufficiently secured?] Not unless it be sufficiently averred. In *Hatchett v. Baddeley (c)*, BLACKSTONE, J., says, “it seems to be supposed by the argument that if the husband is not bound to pay this debt, it follows that the wife may be compelled alone. But this is no legal consequence.” In *Lean v. Schutz (d)*, it was held that at all events the husband must be joined for conformity, and the Court said, “There is no instance in the books of an action's being sustained against the wife, the husband being living, at home, and under no civil disability.” There is no case, even in equity, where the husband is not joined, and only one where actual service upon him was dispensed with, and that was on account of absence in *Jamaica*. *Dubois v. Hole (e)*, *Kenge v. Delaval (f)*. Even after separation a husband has an interest in the person of his wife. After a divorce *a mensa et thoro*, if property come to the wife it belongs to the husband.

Wood, contra.—From the earliest times many exceptions have been admitted to the general rule, that a feme covert is not liable to be sued. One of these exceptions is where a separate maintenance is secured to her. It is immaterial whether the maintenance be by deed or not. It is enough that it is averred to be duly paid. Issue might have been taken upon the due payment of the maintenance. In *Ringsted v. Lady Lanesborough*, the deed by which the maintenance was secured was not set out; it was only stated that it was secured by deed. Here it is averred that a competent separate maintenance and provision was allowed, and

(b) *B. R.*, *H.* 23 *G.* 3, *ante*, p. 197. (d) *C. B.*, *E.* 18 *G.* 3, 2 *W.* *Bl.* 1195.
 (c) *C. B.*, *E.* 16 *G.* 3, 2 *W.* *Bl.* 1079. (e) 2 *Vern.* 613.
 (f) 1 *Vern.* 326.

that averment is sufficient. It is not easy to understand what is gained by the argument that the husband is amenable to the process of the Court. It is clear, and indeed it has been so determined in an action against this very husband, that he is not liable. In *Hatchett v. Baddeley*, there was no determination on the general question, and in *Lean v. Schutz*, the Court got rid of the case on the point of conformity. In *Turtle v. Lady Worsley (g)*, the plea of coverture was in abatement instead of being in bar, which was held bad, and there was the same error in *Lean v. Schutz*. With regard to feme sole traders in *London*, the execution goes against the wife only, but it is part of the custom that the husband shall be joined as defendant. The principles upon which *Ringsted v. Lady Lanesborough* was decided, apply in this case, and the demurrer must be overruled.

Law, in reply. In the actions against a feme sole trader in *London*, the husband is joined by the common law, and not by the custom. The custom merely is that the wife may be sued. *Langham v. Bewett (h)*.

LORD MANSFIELD.—The question is, whether a married woman can be sued for a debt on her own contract? The general principle of law is against her liability. But *quicquid agant homines* is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind. Hence, centuries ago, exceptions have been engrafted upon this rule, as in the case of abjuration, &c. The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law. They may be separated, not only between themselves, but as regards third persons. It was admitted that where the separate maintenance is known to the creditor, the husband is not liable. The whole question was fully gone into in the case of *Ringsted v. Lady Lanesborough*, and an objection was taken then, as well as in the present case, that the husband ought to have been joined. I have no difficulty in getting over that, notwithstanding the authority. Why should the husband be joined to nonsuit the plaintiff? He is not liable. The next objection was that the maintenance should appear to be by

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(g) *Ante*, p. 290.

(h) *C. B., E. 3 Car. Cro. Car. 68.*

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deed. It is, however, sufficiently alleged and admitted. Then, it is said, that the husband resides in *England*, but though he does, he is not liable; and, therefore, I think, on the authority of *Lady Lanesborough's* case, that judgment must be for the plaintiff.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—In *Ringsted v. Lady Lanesborough*, all the circumstances were thrown together in the judgment, but the main circumstance was that the husband was not liable. The question of conformity was also discussed pretty fully in that case. It is now pressed only on authority. Is there any case in which you must make a party to the suit, a person against whom you cannot have judgment? None is produced. The case of the feme sole merchant in *London* goes wholly on the custom, and not on the common law attaching upon the custom. I consider *Lean v. Schutz* no authority on the point of conformity.

Judgment for the plaintiff (i).

(i) *Vide ante*, p. 204, note (o).

Friday,
 6th February.

PHILIPS and Another v. BAILLIE.

The defendant having chartered a ship put her up at *Lloyd's*, with notice that she would sail with the first convoy. The plaintiffs shipped goods on board, and insured them with a warranty that the ship should sail with convoy. Before the ship sailed the preliminaries of peace were gazetted, and hostilities on the part of the king's subjects were forbidden, and ships taken by the various powers within certain limits and certain times were to be restored. Government appointed no convoy, and the ship sailed without, but with *French, Spanish, and American* passports. No notice was given by the defendant to the plaintiffs that the ship was about to sail without convoy. The ship was run down and lost the day after she sailed. In an action against the defendant for breach of his contract, whereby the plaintiffs were deprived of the benefit of their policy, held that the plaintiffs were entitled to recover.

THIS was an action of assumpsit tried at *Guildhall*, at the sittings after *Michaelmas Term*, before BULLER, J. The first count of the declaration (which was the most material) stated that the defendant was possessed of a ship called the *Vigilant*, then about to sail from *London* to *St. Lucia*, and in consideration that the plaintiffs would ship goods on board her, the defendant undertook that the ship should sail with convoy from *London* to *St. Lucia*. That the plaintiffs did ship goods of the value of £1000, and paid the defendant £100, being a reasonable freight. That the plaintiffs, by a policy of insurance, caused their said goods to be insured to the value of £800, and by the policy warranted that the said ship should sail with convoy from, &c. Yet the defendant, not regarding, &c., did deceive the

plaintiffs in this, that the said ship, without the knowledge or licence of the plaintiffs, sailed on her said voyage without convoy, and was afterwards run foul of by another ship and sunk, and that the goods were thereby lost. And that by means of the ship having so sailed without convoy, contrary to the defendant's undertaking, and to the warranty contained in the said policy, the plaintiffs were deprived of all benefit of the said policy, and have not, nor can receive any benefit from it. The defendant pleaded the general issue, and the jury found a verdict for the plaintiffs, damages £800, subject to the opinion of the Court on the following case:

The ship *Vigilant* was chartered, on the 26th October, 1782, by the defendant, and was put up at *Lloyd's* coffee-house for freight, with notice that she would sail with the first convoy. On the 10th January, 1783, the plaintiffs shipped goods on board the said ship on freight, and caused £800 to be insured on the said goods, and warranted the ship to sail with convoy. The ship sailed from *London*, and arrived at *Spithead* on the 20th January, 1783, after which time no convoy appointed by government ever sailed; but, on the 8th March, 1783, a copy of the following order was sent, by the Lords of the *Admiralty*, to *John Young*, Esq., commanding his majesty's sloop the *Speedy*, at *Spithead*. [The order directed captain *Young* to proceed to sea the first opportunity, with the *Speedy*, &c., taking under his convoy such merchantmen, bound to the *West Indies*, as should choose to accompany him, and to conduct them to *Barbadoes* and *Jamaica*.] On the 15th February, the proclamation and notice appeared in the *London Gazette*. [The proclamation recited the signature of the provisional articles with *America*, and of the preliminaries with *France* and *Spain*; that it had been agreed by his majesty, *France*, *Spain*, *Holland*, and *America*, that ships should be restored on all sides, those that were taken in the channel and north sea, twelve days after the ratification of the preliminaries; from the channel to the *Canaries* one month; from the *Canaries* to the equator two months; and, for all the rest of the world, five months. That the ratifications were exchanged with *France* on the 3d February, and with *Spain* on the 9th, and that hostilities should cease with *Holland* and *America* at the same time as with *France*. It then charged all officers by sea and land, "and all our subjects whatso-

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ever," to forbear all hostilities against *France, Spain, Holland, and America* after the times above-mentioned. The notice was, that his majesty in council was pleased to declare and order, that, for the convenience and security of the commerce of his subjects during the cessation of arms, passes will be delivered, as soon as they can be interchanged, to such of his subjects as shall desire the same for their ships, goods, merchandise, and effects.] The defendant caused his own policy of assurance of goods on board the *Vigilant* to be altered by striking out the warranty as to the ship's sailing with convoy, but did not give any notice to the plaintiffs that she would sail without convoy. The ship sailed from *Spithead* without convoy, on the 4th *March*, by the directions of the defendant, and was next day run down by the *Minerva* frigate. She sailed with *French, Spanish, and American* passports, but no *Dutch* passports, none having been issued at that time.

It was admitted in the argument, that an action on a similar policy, on the same ship, had been brought against the underwriters, in which the plaintiff failed on account of the warranty. The name of that cause, which was tried at the sittings in *Michaelmas Term* last, was *Robinson v. Vaughan*.

S. Heywood for the plaintiffs.—It will be said, on the other side, that the contract as to the sailing with convoy was dissolved by the peace, and the subsequent proclamation. But what is the effect of that proclamation? It prohibits hostilities against the enemy, but there is nothing in it to prevent hostilities on their part. It mentions different times of cessation for different latitudes. Some the ship must have passed through; others she might have been driven into. But even in time of peace the warranty might operate. It is said in *Beawes (a)*, that, "even in times of peace, convoys are ordered by the government, to guard and defend our trading vessels from the assaults of pirates, or encroachers on our commerce, more especially in our fisheries and other parts of the *West Indies*, where they may be exposed to such attacks by commercial intruders." A contract like this, therefore, is not necessarily dissolved by the cessation of hostilities. But it may be said that, supposing the warranty to continue, it has been complied with by putting

(a) *Title Convoys and Cruisers*, p. 261, ed. *Dubl.* 1795.

passports on board. In *Pawson v. Watson* (b) it is said, "there is no distinction better known than that which exists between a warranty or condition which makes part of a written policy, and a representation of the state of the case. When it is part of the written policy, it must be performed; as, if there be a warranty of convoy there must be a convoy; nothing tantamount will do or answer the purpose; it must be strictly performed." [Lord MANSFIELD.—This is not a warranty, but an agreement.] A warranty and a representation are words appropriated to policies of insurance; in other cases, every agreement is a warranty. These advertisements of ships are always considered as specific agreements. *Gordon v. Morley* (c). The meaning of the agreement was to secure the ship against capture in a particular way. The defendant has taken upon him to substitute another. Had this ship met with a *Dutch* cruiser, she had no protection. But supposing that it was not necessary for the defendant to comply strictly with the terms of the agreement, the defendant ought still to have given notice of the alteration. In consequence of that want of notice, the plaintiffs have not procured an alteration of their policy, and cannot recover upon it. It cannot be said that the plaintiffs ought to have taken notice of the proclamation, for, notwithstanding the proclamation, the ship might have sailed with convoy, since convoys are appointed not only as a protection against capture by an enemy, but also against pirates and accidents.

Wood, contra.—The distinction between warranties and representations must be admitted, but the contract in this case resembles the latter rather than the former. The contract between these parties was by bill of lading, and convoy was mentioned only in the paper at *Lloyd's*. That therefore was collateral to the contract, and like a representation. It must, therefore, be complied with substantially, and without fraud. It is clear that, at the time when the advertisement was stuck up, it was the intention of the owner to sail with convoy. There is no fraud in his non-compliance with that undertaking, which has been rendered unnecessary by public events over which he had no control. The undertaking was,

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(b) *K. B., E. 18 G. 3, Cowp.*
787.

(c) *K. B., sutt. after M. T.,*
1746; *Bcawes*, 320, ed. *Dubl.*
1795.

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to sail "with the first convoy;" but that undertaking has reference to the situation of the country. The convoy was to be appointed by government; and, as none was appointed, the defendant performed his contract *cy pres*. The damage was not such as could have been avoided had the vessel sailed with convoy, for she was run down in the channel by an *English* frigate. But it is said that the defendant ought to have given notice. If, indeed, this had been a matter of a private nature, notice might have been requisite, but here the fact of which notice was to be given was public and notorious. The passports which this vessel carried were better than convoy, and in many cases the underwriters abated the premium on account of the change. It is said that the vessel might have got into latitudes where the enemy were not restrained from capture, but it is a sufficient answer that the accident happened before she got into any such latitudes.

LORD MANSFIELD.—The defendant put up the ship at *Lloyd's* for freight, "to sail with the first convoy." He therefore undertakes, to all the world, to sail with convoy, and on the faith of this undertaking, the plaintiffs, who insure their goods, warrant in the policy that the vessel shall sail with convoy. She sails without convoy, and is lost by accident. The insurers defend themselves on the ground of a noncompliance with the warranty, and the plaintiffs are nonsuited and bring this action. Their loss is the amount of the sum which they fail in recovering from the underwriters. The doctrine of warranty and representation applies only to policies, and confounds any other subject. Here is an agreement. Has the defendant performed it? No. Has any damage been sustained? Yes. What excuse is there? None. Four days after the vessel had sailed a convoy was appointed. It is not true that there was no necessity for a convoy; hostilities had not ceased in all latitudes. Convoys are not merely a protection against enemies, but may be necessary in time of peace. At all events it was the duty of the defendant to give notice to the plaintiffs so as to enable them to alter their insurance. He altered his own. There is nothing to make a question.

Postea to the plaintiffs (d).

(d) See *Snell v. Marryat*, B. 212; *Saunderson v. Busher*, 4 R., 48 G. 3; *Abbott on Shipp.* Campb. 54 (n).

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THE KING v. JOHN EYLES, Esq.
(Reported, Caldecott, 407.)

Saturday,
7th February.

THE KING v. THE INHABITANTS OF ST. ANDREW,
HOLBOEN.
(Reported, Caldecott, 408.)

Saturday,
7th February.

THE KING v. THE CORPORATION OF BRIDGEWATER.

Monday,
9th February.

A RULE was obtained for a mandamus to the senior alderman, &c. of *Bridgewater* to go to the election of a mayor under the statute, 11 *Geo.* 1, c. 4. The ground of the application was that the present mayor's election was void, he having been elected at a meeting where the former mayor presided, and such former mayor having been since ousted by *quo warranto*.

Morris and *Rooke*, Serjeants, against the rule. *Non constat* that the judgment of ouster in the *quo warranto* was valid or on fair grounds, and though the defendant did not controvert it, yet the present mayor ought to be allowed to do so, and is ready to go into such proof. Although it has been taken for granted, that if the mayor is ousted who presided at any election, the election of all persons taking place before him is bad, yet there is no decision to that effect, and it seems reasonable that where the election is on a charter-day, and the bad mayor only presides ministerially, and not at a meeting called by his act, if the persons elected have a majority, their election should stand. [BULLER, J. —Is there any case in which it has been held that an election at which a mayor *de facto*, but not *de jure*, presided has been held good?] It was so held at *nisi prius* by Mr. Justice BLACKSTONE in a case of the *King* v.

Where the mayor who presides at the election of a new mayor is only mayor *de facto* and not *de jure*, and is subsequently removed by judgment of ouster, the election of the new mayor is void, and the Court will grant a mandamus for the election of a new mayor, under *stat.* 11 *G.* 1, c. 4, although a *quo warranto* is depending against the present mayor.

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Spearing (a), at *Winchester*. So far from the title of the present mayor being clearly bad, the prosecutors have obtained an information in the nature of a *quo warranto* against him, and though a plea has been put in, they refuse to wait the event of that trial.

Grose, Serjeant, and *Lawrence*, *contra*.—The question is, whether there has been a due election. It is a first principle of election law that an election under a bad mayor is bad. That the mayor under whom the present mayor was elected was a bad mayor appears on record; and there is no pretence for saying that the judgment of ouster was obtained collusively. The present mayor might have come in, and have prayed for liberty to defend the former mayor's title in the *quo warranto*. Not having done so, he cannot now dispute the judgment of ouster. The act of election is not simply ministerial, as in some cases the act of a justice of the peace, nor can it make any difference that the election took place on the charter-day; for where the presence or consent of the presiding officer is necessary, as it is on the charter-day, if he is a bad mayor, what is done at such a meeting is bad. In order to support the present mayor's title in pleading, it would be necessary for him to state that at his election the former mayor presided, upon which issue might be taken, and the judgment of ouster would support the negative of that issue (b).

Lord MANSFIELD having stated the occasion and history of the statute, 11 *Geo.* 1, c. 4, said, It has always been understood that when a bad mayor presides, all elections under him are bad. It is clearly so when the meeting is not on the charter-day, but called under the statute, and I can see no reason for the difference attempted to be set up. Under the statute, "if no election shall be made," or being made, "shall afterwards become void," (which must mean, shall turn out to have been void by subsequent judgment of ouster, for, if good at first, it could not become void *ex post facto*), a remedy is provided; either, 1. If there has been no

(a) See a short note of this case 1 *T. R.* 4 (a), from which it appears that the Duke of Bolton, who had been mayor *de facto*, was dead, and BLACKSTONE, J., said he would not suffer the title to be impeached after the death of the person from whom it was derived.

(b) See *The King v. Smith*, *B. R.*, *T.* 56 *G.* 3, 5 *M.* & *S.* 271.

election, that the corporation must meet next day; or, 2. If there is no election pursuant to the directions of the statute; or, if the election becomes void, a mandamus may be applied for. The Court will grant the mandamus in the first instance, without waiting for the ouster of the persons elected, because the mandamus concludes nothing; but, on the trial, the validity of the elections may be gone into. In *The King v. Cambridge*, the mandamus issued without waiting for a *quo warranto* against the mayor *de facto*, who was abroad, and could not be sworn in, and therefore was chosen merely that the old mayor might hold over.

WILLES, *Justice*.—I am of the same opinion. The *quo warranto* against the mayor *de facto*, which the counsel against the rule wished should be tried first, was not pleaded to until after this rule was applied for.

BULLER, *Justice*, of the same opinion. I think that in *The King v. Cambridge*, the Court said that they would not grant a mandamus under the act, except in a clear case; and there is good reason for this, because when the mandamus issues, if the majority of the electors choose to obey it, the actual mayor, though he may have a right, cannot help it (c). But I think the present is a clear case. There is no denial by the defendants of the grounds made; and as to the point of the bad mayor presiding, the current of decisions has been, that, in all such cases, elections under him are void (d). And the reason of the thing is so, for without his presence there is no corporate meeting. He is an integral part of the corporation. With regard to the case of *The King v. Spearing* (e), tried at *Winchester*, before BLACKSTONE, J., which has been mentioned by Mr. Morris, my memory fails me much if the ground the Judge went upon was not this: he said, "These are mere issues of fact. We are only to try whether, in fact, the Duke of Bolton was mayor of *Winchester*, and have nothing to do with objections to him in point of law." Whether the learned Judge was

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(c) See *The King v. Newsham*, B. R., E. 28 G. 2, Sayer, 211; *The King v. Banks*, B. R., H. 4 G. 3, 3 Burr. 1454; *The King v. Mayor of Colchester*, B. R., H. 28 G. 3, 2 T. R. 259; *The King v. Mayor of York*, B. R., T. 32 G. 3, 4 T. R. 699; *The King v. Corporation of Bedford Level*, B. R., E. 41 G. 3, 6 East, 360.

(d) See *The King v. Smith*, B. R., T. 56 G. 3, 5 M. & S. 271; *The King v. Hughes*, B. R., T. 6 G. 4, 4 B. & C. 378.

(e) V de ante, p. 380 (n).

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right in that opinion is a question, but it was acquiesced in, and the case never moved in this Court, which is a sufficient reason why it should not bind as an authority. [It was stated by *Morris*, that the Duke of *Bolton* had taken a colourable residence, to qualify him to be chosen mayor.]

Rule absolute.

Whereupon *Lawrence* prayed a writ to go to the subsisting corporation, to elect a mayor, and a separate writ to the mayor, &c. (to be used when the mayor should be elected), to elect four capital burgesses. The reason of there being two separate writs was, that the capital burgesses were not annual officers, and therefore not within the statute 11 *Geo. 1, c. 4*. In the *Scarborough* case (*f*) there was but one writ, all the officers to be elected being annual. The rules were accordingly directed as prayed, and a person was named to give notice.

(*f*) *B. R., H. 16 G. 2, 2 Str. 1180.* In *Mr. Ford's note of King's Bench* held that the statute was not confined to annual officers. *8 East, 272* officers. (*n*); and in *The King v. Thet-*

Wednesday,
 11th February.

BRYSON v. WYLIE.

(*Reported, 1 Bos. et Pul. 83 (n).*)

Wednesday,
 11th February.

ELAN v. REES (*a*).

Where the plaintiff resides permanently abroad, the Court will stay proceedings till security is given for costs.

COWPER had obtained a rule to show cause why the proceedings in this action should not be stayed till the plaintiff, who resided in *Dominica*, should give security for costs. He said he was aware that this motion had been often refused (except in cases of ejectment), but that it had been granted last term in a case similar to the present, though strongly opposed by *Baldwin*.

Cause was now shown, and several cases cited, notwithstanding which the rule was made absolute, *Cowper* having

(*a*) *S. C. cited 1 Tidd's Pr. 580, 8th ed.*

taken a distinction to which BULLER, J., and the Court assented, between a plaintiff who resides permanently abroad, as in this case, and one who is abroad *animo revertendi* (b).

Rule absolute (c).

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(b) Vide *Anon. B. R., H.* 1815, 2 *Chitty's Rep.* 152; *Parquot v. Eling, C. B., H.* 29 G. 3, 1 *H. Bl.* 106.

(c) See *Tidd's Pr.* 580, 8th ed.; *Ganesford v. Levy, C. B., M.* 33 G. 3, 2 *H. Bl.* 118, 4th ed. and the note there.

DOE v. JOHNSON and Others (a).

Wednesday,
11th February.

ACTION for the costs of an ejectment. Motion to set aside proceedings for irregularity, on the ground that the name of the defendant was not in the notice at the foot of the copy of the latitat, as required by the form prescribed in 5 *Geo. 2, c. 27*.

Where there is an irregularity in the notice at the foot of the copy of a latitat, which is served in November, an application to set aside the proceedings for irregularity made at the end of *Hilary Term* is too late.

Bower showed cause.—He said he supposed a case would be relied on, of *Behema v. James* (b), which he hoped could not be law, it being absurdly strict, but that at any rate the objection came too late, for the writ was served in *November*, and the declaration delivered last term.

The Court did not seem to deny the case in *Wilson*, but thought the defendants came too late.

Lord MANSFIELD said he would not allow them to walk slow.

Rule discharged (c).

(a) *S. C.* cited *Tidd's Pr.* *M.* 40 G. 3, 2 *Bos. & Pul.* 38; 166, 8th ed. *Wilson v. Stafford, B. R., H.*

(b) *C. B., T.* 18 & 19 G. 2, 1820, 2 *Chitty's Rep.* 355; 1 *Wils.* 104. *Harden v. Wood, B. R., T.*

(c) See *Worgman v. Plank,* 1819, 1 *Chitty's Rep.* 500, 1 *C. B., H.* 29 G. 3, 1 *H. Bl.* *Tidd's Pr.* 166, 8th ed. 100; *Jones v. Armytage, C. B.,*

WHITFIELD v. HUNT.

(Reported, ante, vol. ii. p. 727 b, note [† 155]).

Thursday,
12th February.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE

TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.

Saturday,
1st May.

THE KING *v.* ROBERT LLOYD and Others.
(*Reported, Caldecott, 415.*)

1784.

CLEMENTS *v.* PASKE (a).

Monday,
3d May.

Devise to the first and eldest son of the body of J. C. lawfully issuing or issued, and for default of such issue then *likewise* to the second, third, and every other son of J. C. successively, and in remainder the one after the other as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of such second, third, or other son or sons, &c., and in case of such issue male failing by the said J. C. then, &c. Held that the eldest son of J. C. took an estate tail.

THIS was a case from the *Court of Chancery*, the material parts of which were as follows :

James Clements, by his will, dated 7th *May*, 1767, after giving several estates to his nephew, *James Clements*, and several pecuniary legacies, devised as follows:—" *Item* all my other real or leasehold estates whatsoever, I give to *Samuel Cockerill* and *George Cockerill*, and their heirs for and during the life of my nephew, *James Clements*, to the intent to support the contingent remainders in this my will, but in trust nevertheless to permit my said nephew to receive the rents and profits during the term of his natural life;

(a) *S. C.* cited 1 *M. & S.* 130.

and from and after his decease I devise all the said copyhold and leasehold estates last mentioned to the first and eldest son of the body of my nephew, *James Clements*, lawfully issuing or issued; and, for default of such issue, then, likewise, to the second, third, and every other son of my said nephew, *James Clements*, successively; and in remainder, the one after the other, as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of such second, third, or other son or sons, the eldest of such sons, and the heirs male of his body, being always preferred, and to take before any of the younger sons and the heirs male of his body. And in case of such issue male failing by my said nephew, *James Clements*, then I give, &c., to the first and eldest son of the body of my nephew, *Matthew Clements*, lawfully issuing, and to the heirs male of the body of such first son, lawfully issuing; and, for default of such issue, then, likewise, to the second, third, and every other son, &c. (in the same words);” and on failure of issue male of *Matthew Clements*, remainder to the daughters of *Matthew Clements*, remainder over.

The case also stated a will of the testator, executed about a year before, which, with respect to the lands in question, was exactly in the same words as the above, except that, after the limitation to the first son of *James Clements*, it added the words, “and to the heirs male of the body of such first son, lawfully issuing or issued.”

The copyhold lands had before been surrendered to the use of the testator’s will. The testator died soon after the making of his will, and his nephew, *James Clements*, the father of the plaintiff, entered, and died in 1779. The plaintiff, who at his father’s death was twenty-three and upwards, was the only son by his father’s first wife, and the only child his father had in the testator’s life. *James Clements* left a son and five daughters by his second wife, all living.

The plaintiff entered, and suffered a recovery of the freehold, and also of the copyhold, in the Lord’s court, to the use of himself and his heirs. *James Clements*, the plaintiff’s father, was heir-at-law to the testator.

The question for the opinion of the Court was, what estate the eldest son of *James Clements* took under the will.

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 PASKE.

Troward, for the plaintiff.—The eldest son of the testator; *James Clements'* nephew, took an estate in tail male under the will. It is true in legal strictness, that where there is a devise to a man without any words of inheritance superadded, he can only take an estate for life; but words of inheritance will be supplied where that is the apparent intent of the testator, for the construction must be agreeable to the intent of the testator, collected from the will; *Evans v. Astley (b)*. Had the testator meant to give an estate for life to the eldest son of his nephew, he would have given it in the same words as he used in another part of his will, where he gave an estate for life. The words "in case of such issue male failing by my said nephew, *James Clements*," show that the testator did not intend that the estate should go over until failure of issue male of *James Clements*. The words "then likewise," &c., are to the same effect.

Wood, contra.—The eldest son of *James Clements* takes only an estate for life. The first will, which was revoked, must be laid out of the case, and cannot supply any evidence of the testator's intention when making the will in question. It is possible that it may have been the intention of the testator to give an estate tail, but there are no words in the will from which such an intention can be collected. *Voluit, non dixit*. The use of the word *such* in the clause mentioned on the other side respecting the failing of issue is very material, and confines the operation of that clause to the issue of the second and other sons. The word "*likewise*" is relied upon; but that construction is too far-fetched. It is no more than an introduction to the devise, like *item*. He cited *Doe dem. Briddon v. Page (c)*; *Keene dem. Pinnock v. Dixon (d)*.

Cur. adv. vult.

LORD MANSFIELD.—There is no limitation after the devise to the first son, but there is after the devises to the second, third, and other sons. In the construction of wills it is necessary to avoid two extremes. The first is that of arbitrary conjecture, for the Court cannot make a will; the second, that of strictness, which in consequence of a slip in technical or positive expression may prevent a meaning

(b) *B. R., M. 5 G. 3, 3 Burr.* p. 294, 1 *B. & P. (n) S. C.*
 1570. (d) *B. R., M. 24 G. 3, ante,*
 (c) *B. R., M. 24 G. 3, ante,* p. 313, 1 *B. & P. (n) S. C.*

evident, and such as no man can doubt, from taking effect. This will is in strict settlement, which is a form well known, and always in the same words. It is copied from a former will. The word "*likewise*" makes it the same as if after giving estates tail to the second, third, and other sons, the testator had said, I mean to give the eldest son the same estate.

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We have certified accordingly (c).

(c) See *Doe v. Hallett*, B. 124; *Langston v. Pole*, C. B., R., H. 43 Geo. 3, 1 M. & S. M. 9 G. 4, 5 Bingh. 228.

BATES v. JENKINSON.

(See 6 T. R. 618, 257; 1 Tidd's Pr. 161, 8th ed.)

Monday,
3d May.

THE KING v. THE INHABITANTS OF ASHTON UNDERHILL,
and

THE KING v. THE INHABITANTS OF CHARLTON.

(Reported, Caldecott, 416.)

Wednesday,
5th May.

THE KING v. THE INHABITANTS OF ALTON.

(Reported, Caldecott, 424.)

Wednesday,
8th May.

BENNETT v. JOHNSON (a).

7th May.

THIS was an action of trover for a quantity of silk, tried before Lord MANSFIELD at *Westminster*, at the sittings after *Hilary Term*, when a verdict was found for the plaintiff, subject to the following case:

Dyers have not a general lien, independent of the usage of trade.

The plaintiff was in use to send silk to the defendant to be dyed. There was due from the plaintiff to the defendant 17s. 2d. for dyeing. The plaintiff sent the silk in question

(a) S. C., 2 Chitty's Rep. 455.

c c 2

1784.

BENNETT

v.

JOHNSON.

to be dyed. It was dyed, and 3*s.* 6*d.* was due to the defendant for dyeing it. The plaintiff tendered the 3*s.* 6*d.* and demanded the silk, which the defendant refused to deliver unless he were paid the 17*s.* 2*d.* also.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover; and if the Court should be of that opinion, the defendant was to deliver up upon oath all the silk sent to him to be dyed.

The case coming on to be argued by *Mingay* for the plaintiff, and *Gibbs* for the defendant,

Lord MANSFIELD directed *Mingay* to look into the cases, and if he found that a dyer had such a lien upon goods in his hands to dye, as to entitle him to retain for what was already due, then to advise his client not to proceed.—His Lordship added, that if this point was not already determined, it might rest a good deal on the usage of the trade.

The case came on again for argument in this term, when *Gibbs* stated that he was aware of the case of *Green v. Farmer (b)*. He also referred to another case of *Stanton v. Lane*, at *Guildhall*.

BULLER, *Justice*.—That went upon usage.—Here there is no usage, and we cannot go out of the case.

Judgment for the plaintiff (c).

(b) *B. R.*, *F.* 8 G. 3, 4 *Burr.* 2214.

(c) So in *Close v. Waterhouse*, *B. R.*, *T.* 42 G. 3, 6 *East*, 524 (n), where the jury negatived any usage conferring the lien, the Court held that dyers had not a general lien. But in *Savill v. Barchard*, 4 *Esp. N. P. C.* 53, such a lien was established, evidence being given of the course and practice of trade. So in *Rose v. Hart*, *C. B.*, *T.* 58 *Geo.* 3, 8 *Taunt.* 499, *GIBBS, C. J.*, after observing that the case of *Green v. Farmer* had been frequently disregarded,

said, "In a case in which I have the brief, and in which case Lord *Ashburton* was, a special custom for dyers to have their general lien was proved; and, notwithstanding *Green v. Farmer*, that custom was acted upon in that case, and has been many times since recognized." See also *Humphreys v. Partridge*, *Montague*, *B. L.* 18 (n). As to the evidence of usage sufficient to establish a general lien, see *Rushforth v. Hadfield*, *B. R.*, *T.* 45 G. 3, 6 *East*, 326; *Holderness v. Collinson*, *B. R.*, *T.* 8 G. 4, 7 *B. & C.* 216.

1784.

BARCLAY and Another v. CUCULLA Y GANA (a).

Friday,
7th May.

THIS was an action of assumpsit, tried at *Guildhall*, at the sittings after *Hilary Term*. The first count stated, that the plaintiffs, being possessed of ten bales of goods, shipped the same on board the vessel *N. S. della Conception*, of which the defendant was master, then lying in the *Thames*, to be safely carried to *St. Sebastian's*, in *Spain*, for a certain freight, the dangers of the seas excepted. That the defendant undertook and promised to carry the said goods safely, but that he had not carried them safely. The second count added, that the goods were to be safely kept in the said ship until she set sail, and that the defendant had not safely kept them, &c. There were also the common money counts. The defendant pleaded the general issue, and a verdict was found for the plaintiffs, subject to the following case :

The master of a general ship, on board of which goods have been laden in the *Thames* for a foreign port, is liable for the loss of the goods occasioned by a forcible robbery while the ship is lying in the river.

The plaintiffs put on board the defendant's ship ten bales of goods, to be carried to *St. Sebastian*, for which the defendant gave a bill of lading. The defendant has only delivered eight of the said bales. Whilst the ship lay in the *Thames* with the goods on board, the defendant, the captain, being on the watch, she was attacked and boarded, about two in the morning, by eleven men, armed with pistols and cutlasses, who took the captain aside, and threatened to murder him if he gave notice to any of his men on board, and took away two of the said bales by force. The action is brought to recover £70. 2s. 3d., the value of the said bales. The question is, if the plaintiffs ought to recover.

Wood, for the plaintiffs.—The defendant is in the situation of a common carrier by land, and is liable for every loss which does not happen by the act of God or the king's enemies; *Morse v. Slue* (b); *Coggs v. Barnard* (c). It is immaterial whether the goods are to be carried by land or by water; but here the ship being in the river *Thames*, the case is the same as land carriage.

(a) Cited, 1 *T. R.* 33, no- *Vent.* 190, 238.
mine Barclay v. Heygena. (c) *B. R.*, *T. 2 Ann.*, 2 *Ld.*
(b) *B. R.*, *H. 23 & 24 C. 2*, *Raym.* 918.

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S. Heywood, contra.—In every case except in that of a common carrier, who is liable on the custom of the realm, a bailee is only bound to take as much care of the goods bailed to him as of his own. The exception with regard to carriers is not of early date. From the *Doctor and Student*, it appears to have been formerly held, that a common carrier was chargeable, in case of a loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour (*d*). It is, however, now clearly settled, that a carrier is answerable for a loss by robbery. The reason given is, in order to prevent the combining of carriers and robbers. Here the defendant was not a common carrier. It is neither alleged in the declaration, nor was it proved that he was such. A common carrier is a public officer. The rates to be charged by him are settled by justices of the peace, and goods carried by him are privileged from distress; *Gisbourn v. Hurst* (*e*). In *Boson v. Sandford* (*f*), the ship is stated to have been used for the common carriage of goods, and the declarations against hoymen, in every case, except one in *Wilson* (*g*), state them to be common hoymen. The defendant must be charged either upon the custom of the realm, as usually carrying for hire, or upon his express undertaking; *Boucher v. Lawson* (*h*). Now here he is not charged on the custom of the realm, and no express undertaking appears to render him liable in case of robbery. The case of *Morse v. Slue* is certainly against the defendant; but if it came to be now decided, it would receive a different decision. [*Per Cur.* There was no question at the trial as to the ship being a general ship. No doubt she was so. The question was, whether irresistible force is an excuse to the captain of a ship.] The general position, that the master of a ship is liable in all cases, goes too far. If it includes coasters, it ought not to extend to foreign vessels.

Wood, in reply, was stopped by the Court.

LORD MANSFIELD.—It is impossible to distinguish this from the case of a common carrier. At first the rule appears to be hard, but it is settled on principles of policy,

(*d*) See *Jones on Bailments*, Carth. 59.

103. (*g*) *Dale v. Hall*, B. R., M.

(*e*) B. R., H. 8 Anne, 1 24 G. 2, 1 Wils. 281.

Salk. 249.

(*h*) B. R., H. 9 G. 2, Cases

(*f*) B. R., H. 1 W. & M., temp. Hardw. 199.

and, when once established, every man contracts with reference to it, and there is no hardship at all.

Judgment for the plaintiffs (i).

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(i) See *Sutton v. Mitchell*, one of the perils of the sea. *B. R.*, *M.* 26 *Geo.* 3, 1 *T. R.* *Pickering v. Barkley*, *B. R.*, 18; *Forward v. Pittard*, *B. M.* 24 *Car.* 1, *Stiles*, 132, 2 *R.*, *M.* 26 *G.* 3, 1 *T. R.* 27; *Roll. Ab.* 248; *Abbott on Shipping*, 223, 5th ed. *The taking by pirates at sea is* *pickering*, 254, 5th ed.

CHINNERY v. BLACKMAN (a).

Friday,
7th May.

THIS was an action of assumpsit. The declaration contained, 1. A count for freight of goods carried in a ship of the plaintiff, called the *Blizard*, from *Antigua* to *London*. 2. The same on a *quantum meruit*. 3. A count for work and labour about the carriage of goods of the defendant in a ship of the plaintiff's from, &c. 4. The same on a *quantum meruit*. 5. A count for money paid. 6. A count on an account stated. The defendant pleaded the general issue. The cause was tried at *Guildhall*, before Lord MANSFIELD, when the jury found a verdict for the plaintiff, with £76. 9s. 11d. damages, subject to the opinion of the Court on a case which stated,

The mortgagee of a ship cannot sue in his own name for the freight accruing after the mortgage.

That, by indenture of assignment, dated the 4th of *January*, 1783, *Robert Merrifield*, in consideration of £1166. 18s., which he owed to the plaintiff, assigned to her the ship *Blizard*, with the appurtenances, in which indenture there is a covenant from the plaintiff to re-assign the said ship to *Merrifield*, on payment of £1166. 18s., with interest, on or before the 10th of *November* following. That, at the time of the execution of the said deed, the ship was in the *Thames*: that she afterwards sailed to *Portsmouth*, and continued there till the middle of *March*, in the possession and under the command of *Merrifield*, and that the plaintiff did not then take possession thereof. That *Merrifield* navigated, victualled, and manned the ship, as owner thereof, at his own expense and risk, both from *England* to *Antigua*, and on her return home. That *Merrifield*, at *Antigua*,

(a) *S. C.*, 1 *H. Bl.* 117 (a), nomine *Chinnery v. Blackburne*.

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gave the command of the ship to Captain *Drysdale*, and sent her to *England*, with orders to the captain to address himself to Messrs. *Dunlop*, of *London*, merchants, who were to sell her, according to the directions contained in a letter of which the following is an extract: "*Antigua*, 31st *July*, 1783. Messrs. *J. and R. Dunlop*.—This will arrive to you by the *Blizard*, Captain *Drysdale*, which I have desired him to value himself on you. Am sorry she makes no better freight, as I am obliged to put ballast in her, and, should ships sell well, to have her sold. I think she is worth £1600 sterling. She is well found and strong. Should there be no demand for ships in *London*, I am to request you will send her out for *Antigua* and *Dominica*, provided there is not a load for her at *Dominica*, as soon as possible, as I shall always be able to load her for that port. Mrs. *E. Chinnery* has a demand against me for near £1200, which I am in hopes to remit shortly to you or Mrs. *Merrifield*, so as to pay her. I am, &c. *Robert Merrifield*." That, in consequence of Mr. *Drysdale's* application to Messrs. *Dunlop*, as consignees as aforesaid, to borrow two several sums of £50 each, Messrs. *Dunlop* advanced the same to him, declaring that they should consider him as responsible for the payment, in case they should not receive the same from the freight or sale of the ship, or by remittance from *Merrifield*, which sums they afterwards received back from *Drysdale*. That the ship completed the delivery of her cargo on the 27th *September*, 1783, and the plaintiff took possession of her on the 29th, immediately on receiving information of her arrival in the *Thames*. That the defendants had goods in the ship *Blizard*, consigned to them on the voyage from *Antigua* to *London*, the freight whereof amounts to £76. 9s. 11d., for which the action was brought. That Captain *Drysdale* had paid for lights and custom-house dues, and for clearing the ship, which was afterwards repaid to him by the plaintiff, who also paid his and the mariners' wages in respect of the voyage from *Antigua*, to the amount, in the whole, of £234. 7s. 7d., since her taking possession of the said ship. That the plaintiff has since sold the ship by public auction to the best bidder for £710.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Wood, for the plaintiff.—The case is shortly this: The mortgagee of a ship, having taken possession, brings an

action for freight due after the execution of the mortgage, but before his actual possession. The mortgagee is the complete legal owner. The ship was consigned to *Dunlop* to be sold, but it could not be sold without an assignment of the mortgage, and the money arising from that sale must have been applied to pay off the mortgage. The freight follows, and is incident to the property of the ship. It is like the case of a mortgage of land, where, upon the mortgagee getting possession by ejectment, the arrears of rent are his; and it is no objection that they accrued before he came into actual possession, if they accrued after the date of the mortgage, though it is true that, if they have been actually paid over to the mortgagor, they shall not be paid again to the mortgagee. A mortgagee of land may even distrain without having had any possession; *Moss v. Gallimore* (b). There is no difference in the case of a ship. No one else claims this freight; it has not been paid to the mortgagor. The defence to this action is merely to avoid payment of the money. The plaintiff has paid wages to the captain and seamen, custom-house dues, and other charges, in respect of this voyage; and she is entitled, on the other hand, to the benefit of the freight earned.

Chambre, contra.—The present plaintiff is only a mortgagee, and is not entitled to maintain an action in her own name upon a contract made for the benefit of another. No argument has been urged on the other side, except the analogy to the case of rent; but that analogy does not hold, for the reason why the mortgagee is entitled to the rent is, that it is incident to the reversion. If the mortgagor has recovered the rent, the mortgagee has no remedy against him, because he has permitted the tenant to pay it over. If the mortgagor himself occupies the land, he is liable to no account. He is not, strictly speaking, tenant at will, because he is not subject to the payment of rent. Here the mortgagor himself enjoys the ship; he mans and victuals her; he bestows labour and expense on her; and the freight is earned, and the cargo is delivered, before the mortgagee takes possession. Could a mortgagee bring an action in his own name for corn sold by the mortgagor? The contract and the right of suing are personal matters, which cannot be transferred to another. If the benefit to be derived from

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(b) *B. R., M. 20 G. 3, ante, vol. i. p. 279.*

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the contract can be transferred, the mortgagee must also bear all losses, and be subject to all the improvident contracts of the mortgagor. A case may be stated which has in fact happened,—that the debt now sued for has been attached by creditors in the *Sheriffs' Court*, and judgment obtained. As to the payment of the wages and charges by the plaintiff, they were paid under a notion that they were a lien upon the ship, and they were paid merely for the purpose of getting possession of her.

Wood, in reply.—Undoubtedly circumstances might arise to vary the case, as the attachment (which can be proved to be fraudulent), or a question of set-off; but this is merely a question between the mortgagor and mortgagee. The mortgagor, being suffered to remain in possession, is merely the servant of the mortgagee, who shall have the benefit of the contracts made by him. It is said that rent is incident to the reversion. In the same manner, freight is incident to the ship. The mortgagee paying the wages, &c., a payment rendered necessary by the abandonment of the mortgagor, is, by retrospection, in possession from the commencement of the voyage. The plaintiff does not claim as assignee, but as the legal owner, entitled to the earnings of the ship.

LORD MANSFIELD.—The justice of this case, as between mortgagee and mortgagor, who is not a party to this record, struck me very forcibly at first.

This is an action brought to recover money on behalf of a person who is no party to the contract, against one who has contracted with the mortgagor since the making of the mortgage.

The only ground on behalf of the plaintiff is, that the mortgagor in possession is servant to the mortgagee by an implied contract. But this is not the truth of the case. There is nothing said in the deed about the mortgagor continuing in possession. The mortgagor has been put to great expense; and until the mortgagee takes possession, he is owner to all the world, and is entitled to all the profit made.

WILLES, Justice, of the same opinion.

ASHURST, Justice.—I also am of the same opinion. It could not be that the mortgagor should come upon the mortgagee for a loss, or that the owner of the goods should.

BULLER, Justice.—If the mortgagor is to be considered as agent to the mortgagee, he must be considered so

throughout (c). This cannot be supposed. The payments were made to get possession, but at any rate they could only be used as evidence that the mortgagee was in possession during the voyage. The contrary, however, is stated in the case.

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Judgment for the defendant (d).

(c) It is now decided that the mere legal ownership of a vessel does not make the party liable for the ship's debts, and the proper question in such cases is, "Were the repairs done or the goods supplied on the credit of the legal owner?" See *Jackson v. Vernon*, C. B., H. 29 G. 3, 1 H. Bl. 114; *Westerdell v. Dale*, B. R., T. 37 G. 3, 7 T. R. 306; *Young v. Brander*, B. R., M. 47 G. 3, 8 East, 10; *M'Ivor v. Humble*, B. R., T. 52 G. 3, 16 East, 169; *Jennings v. Griffiths*, coram ABBOTT, C. J., Ry. & Moo. N. P. C. 42; *Harrington v. Fry*, C. B., T. 5 G. 4, 2 Bingham. 179; *Cox v. Reid*, coram BEST, C. J., Ry. & Moo. N. P. C. 199; *Briggs v. Wilkinson*, B. R., T. 8 Geo. 4, 8 B. & C. 30; *Abbott on Shipping*, 17, 5th ed.; and see 4 G. 4, c. 41, § 43; 6 G. 4, c. 110, § 45.

Davidson, B. R., E. 56 Geo. 3, 5 M. & S. 79, affirmed on error, 2 B. & B. 379.

By the statutes, 4 G. 4, c. 41, § 43, and 6 G. 4, c. 110, § 45, when a transfer of a ship is made only as a security for the payment of debts by way of mortgage, or an assignment to trustees for sale, on a statement being made in the book of registry, and on the indorsement on the certificate of registry to that effect, the person to whom the transfer is made, or any other claiming under him, is not to be deemed the owner, nor is the person making such transfer to be deemed to have ceased to be owner, except so far as may be necessary for the purpose of rendering the ship transferred available, by sale or otherwise, for the payment of those debts, to secure the payment of which the transfer was made. *Abbott on Shipping*, 17. It seems that, notwithstanding these statutes, the mortgagee of a ship is entitled, like any other assignee, to the freight accruing after the mortgage. *Dean v. M'Ghie*, C. B., M. 7 G. 4, 4 Bingham. 45.

(d) It has since this decision been held that though the assignee of a ship cannot sue for the freight in his own name, he is yet entitled to it as incident to the ship, and may sue for it in the name of the assignor. *Morrison v. Parsons*, C. B., E. 50 G. 3, 2 Taunt. 407; *Case v.*

ROBERTSON v. TAYLOR.

(Reported, 2 Chitty Rep. 454.)

Friday,
7th May.

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Saturday,
8th May.THE KING v. THE INHABITANTS OF FINDEEN.
(Reported, Caldecott, 426.)Saturday,
8th May.THE KING v. THE INHABITANTS OF MAGHULL.
(Reported, Caldecott, 429.)Saturday,
8th May.

NEVITT v. LADE (a).

Where the plaintiff has been non-processed in the *Exch.*, and afterwards brings an action in *K. B.*, that Court will stay the proceedings till the costs of the former action are paid.

ROUS moved to stay proceedings until the plaintiff paid the costs of a *non pros* in the *Exchequer*.

Philips showed cause, and admitted that if the former action had been in this Court, the application would be right, but it was otherwise where the action had been in another Court; for which he cited *English v. Cox* (b).

The COURT said, that the circumstance of the cause being in another Court made no difference, and that they could not have laid down such a rule as that mentioned by *Philips*.

Rule absolute (c).

(a) S. C. cited 1 *Tidd's Pr.* 584, 8th ed.

(b) *B. R.*, T. 15 G. 3, *Comp.* 322. In this case the former action was brought by another person. See *Lampley v. Sands*, *B. R.*, H. 25 G. 3, 1 *Tidd's Pr.* 584, 8th ed. *post*.

(c) The Court of *Common Pleas* will stay the proceedings where a former action has been discontinued till the costs are paid. *Parkin v. Scott*, *C. B.*, E. 49 G. 3, 1 *Taunt.* 565. So in case of a nonsuit in the former action. *Cranley v. Impey*, *C. B.*, T. 58 G. 3, 8 *Taunt.* 407, 2 *B. Moore*, 460, S. C. But where the plaintiff had been *non-processed* in an ac-

tion for work and labour, &c. against the trustees of a road, without naming them, though they were not incorporated, and afterwards brought another action against two of the trustees by name, the Court of *King's Bench* refused to stay the proceedings in the second action till the costs of the former one were paid, observing that this being an action for the recovery of a debt, they would not prevent the plaintiff from trying his cause, unless it appeared to be vexatiously brought. *Gilbert v. Ryland*, *B. R.*, E. 4 *Geo.* 4, 1 *Tidd's Pr.* 585, 8th ed.

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ALDRIDGE and Another, Assignees of WALL, v. IRELAND,
Esq. (a).

Monday,
10th May.

THIS was an action of trover by the plaintiffs, as assignees of *Alice Wall*, a bankrupt, against the defendant, the sheriff of *Somersetshire*. At the trial before Lord MANSFIELD it appeared that the bankrupt resided at *Bath*, and on *Friday* the 5th of *February* the defendant levied, under an execution at the suit of one *Clinton*, the brother-in-law of the bankrupt, for a very considerable sum of money. On the *Sunday* following the bankrupt left her house, and went to *London* (where she appeared in public), to her brother (leaving word of the place she was gone to), for the purpose of getting her brother to withdraw his execution; but not being able to prevail on him to do so, she never returned home. Two letters were read, one from the bankrupt to her brother, dated the 6th of *February*, stating her wretched condition, and that she did not possess a guinea; and another of the 20th of *February*, in which *Clinton* informed one *Hunter* that his sister had committed an act of bankruptcy, but that his execution was prior to it. It appeared that *Clinton* had levied to secure himself from acceptances which he had not paid. The defendant sold in *March*, and before the commission issued against the bankrupt paid over to *Clinton*, the plaintiff in the action, the sum of £528. The defence was, first, that no act of bankruptcy had been committed. Secondly, that the consideration of the judgment, which was impeached by the plaintiff, could not be gone into in an action against the sheriff, who at the time of the seizure and sale had no notice of any dispute respecting the property. It was also objected that the letter of *Clinton* was not evidence as against the defendant; but Lord MANSFIELD said, that he should consider the sheriff as indemnified by *Clinton*, and that the cause was his, and therefore admitted the evidence (b). The jury having found a verdict

Where a trader at Bath left her dwelling-house and went to London, for the purpose of persuading a creditor to withdraw his execution, and left word of the place to which she had gone, but failing to procure the withdrawing of the execution, did not return to her dwelling-house—Held, that this was no act of bankruptcy.

A sheriff who levies, and pays over the money to one party where the goods are claimed by another, shall be presumed to be indemnified by the party to whom he pays the money, and the declarations of that party are admissible in an action against the sheriff by the other party.

(a) S. C. cited 7 T. R., 512, *Aldridge* before Lord MANSFIELD, where one of the parties

(b) "In a case of *Dyke* v. was a sheriff, who was indem-

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for the plaintiff, a rule was granted to show cause why there should not be a new trial, upon the grounds urged at the trial. An affidavit was made in support of the rule, in which the officer swore that he had no indemnity from *Clinton*, except that he had paid the costs of this action.

Lee, Cowper, Erskine, and Bower having shown cause, and *Peckham* and *Russell* having been heard in support of the rule,

LORD MANSFIELD said, Where a sheriff acts in obedience to a writ, and without notice of an act of bankruptcy pays over the money, he will be protected according to the rules laid down in *Cowper v. Chitty* (c); but when the sheriff knows of another claim, and may take an indemnity of either, and chooses to pay over the money to one party, an indemnity from that party is always implied. At the trial it was taken for granted that this was the cause of *Clinton*, the plaintiff in the former action; and the affidavit states that the sheriff has been indemnified by him as to the costs. I shall therefore lay this part of the question entirely out of the case, and shall only consider the act of bankruptcy. I think it is a very doubtful question, and it makes a very strong impression on my mind, that on leaving her house the bankrupt left word where she was going.

WILLES, *Justice*.—I do not think that this was a departing from the dwelling-house with intent to defraud creditors. Shall not a trader leave his house to consult a friend, or advise with his attorney or counsel? *Clinton's* letter has been relied on as estopping him from disputing the bankruptcy; but we think it very hard that this should bind him (even supposing that he alone is affected), provided the

nified by a third person, Lord *N. P. C.* 372.

MANSFIELD permitted the declarations of that third person to be given in evidence against the sheriff." 7 *T. R.* 665. This is probably the same as the principal case. See also *Smith v. Lyon*, coram *Ld. Ellenborough*, 1813, 3 *Campb.* 465, *Bell v. Ansley*, *B. R.*, *T.* 52 *Geo.* 3, 16 *East*, 143; *Harrison v. Vallance*, *C. B.*, *T.* 3 *G.* 4, 1 *Bingh.* 45; *Robson v. Andrade*, cor. Lord *Ellenborough*, 1816, 1 *Stark.*

(c) *B. R.*, *M.* 30 *G.* 2, 1 *Burr.* 20, 1 *W. Bl.* 65, *S. C.*; see *Coppenden v. Bridgen*, *B. R.*, *T.* 32 & 33 *G.* 2, 2 *Burr.* 818, 2 *W. Bl.* 205, *S. C.*; *Potter v. Starkie*, *B. R.*, *M.* 1807, cited 4 *M. & S.* 260; *Bernasconi v. Fairbrother*, *B. R.*, *T.* 8 *G.* 4, 7 *B. & C.* 379; *Balme v. Hutton*, *Scacc. H.* 8 and 9 *G.* 4, 2 *Younge & Jern.* 101; and *Price v. Hilyar*, *C. B.*, *E.* 9 *G.* 4, 4 *Bingh.* 597.

Court should be of opinion that there has been no act of bankruptcy.

ASHURST, *Justice*.—I think that it was properly left to the jury; but the weight of evidence preponderates against the verdict. It does not appear to me that the departing the dwelling-house was for delay. The bankrupt gave notice where she was going; and her not returning will not make an act of bankruptcy, if her original quitting her house was not so.

BULLER, *Justice*.—The law is not that a man leaving his house and not returning to it thereby commits an act of bankruptcy. The question always is *quo animo* does he quit it. In this case it does not appear to have been done to delay creditors. She tells where she is going, and her conduct is not inconsistent with her declarations. If it had, that would have been proper for the consideration of the jury; as if she had gone to another house, or concealed herself at her brother's.

Rule absolute (*d*).

(*d*) See *Ex parte Osborne*, *Canc.* 1813, 2 *Ves. & B.* 177.

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HARPER v. EYLES.

Tuesday,
11th May.

TRESPASS for mesne profits, tried before WILLES, *J.*, at *York*. On producing the record in the ejectment, it appeared that there was a remittitur of the damages, which is commonly entered to accelerate the judgment, and prevent a writ of error. It was suggested by some gentlemen, not in the cause, that the plaintiff, by taking this expeditious method, waived the mesne profits, and that he could now recover no damages, and consequently no costs. Upon this WILLES, *J.* non-suited the plaintiff, with leave to move to set aside that non-suit without costs.

Lec showed cause against setting aside the non-suit, and cited *Aslin v. Packer* (*a*).

BULLER, *Justice*.—If the action had been in the name of the nominal plaintiff, it would be but a mere formal objection, and the Court has always considered the ejectment as

In an action of trespass for mesne profits by the lessor of the plaintiff, after a recovery in ejectment, it is no answer to the action that a remittitur damna has been entered on the record in the action of ejectment.

(*a*) *B. R.*, *M.* 32 *G.* 2, 2 *Burr.* 665.

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a particular action founded on a fiction for the purpose of recovering possession only, and it was competent to the plaintiff to bring an action to recover his damages. But here the action being brought by the lessor, it was not even an objection in form.

WILLES, *Justice*, agreed that the non-suit could not be supported.

Rule absolute.

Friday,
14th May.

The Court will not set aside a judgment by default to let in a plea of bankruptcy.

STAFFORD v. ROUNTICE (a).

DEBT on bond.—*Baldwin* moved to set aside the judgment which had been signed, and let in the plaintiff to plead bankruptcy, on an affidavit that the judgment had been suffered to go by mistake, and that as soon as it was signed defendant offered to pay the costs.

Couper showed cause.—The Court at first on the particular circumstances granted the rule; but some time after, on consideration, they said it was settled that a judgment could not be set aside to let in a plea of bankruptcy, any more than a plea of the statute of limitations.

Rule discharged (b).

(a) S. C. cited 1 *Tidd's Pr. C. B.*, T. 37 G. 3, 1 *Bos. & Pul.* 52, *contra*.

(b) *Sed vide Evans v. Gill*,



Friday,
14th May.

Where the original writ is against two, and the plaintiff declares against them separately, the Court will not set aside the proceedings.

DURRANT v. SCROCOLD (a).

DEBT on bond by original.—*Baldwin* moved to set aside proceedings, on the ground that the original was against two, and the plaintiff had declared against the present defendant alone; and, in another declaration, against the other person named in the original; by which, he said, the king had only one fine instead of two that he was entitled to if there were separate actions.

Chambre showed, for cause, that this was matter for plea

(a) S. C. cited 1 *Tidd's Pr.* 453, 8th ed.

in abatement; and defendant having missed his time, the Court would not assist him in this way. *Baldwin* said, it was now settled that the defendant would not have oyer of an original, and therefore he could not plead in abatement. The Court said, the objection was no more than that the writ did not support the declaration, which was a plea, and not a ground of a motion. As to oyer, it was to be demanded on the record, and defendant must take the regular course;—the Court would not assist him.

Rule discharged.

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STOKES v. SAUNDERS, Administratrix, &c.

Tuesday,
11th May.

INDEBITATUS ASSUMPSIT for goods sold and delivered, tried at *Bedford*, before Lord LOUGHBOROUGH. Plea, *plene administravit* only. The contract proved was a purchase of cattle fifteen years ago, which the intestate was to pay for on the marriage of the plaintiff, which did not happen till lately, and two years after the death of the intestate. It was objected for the defendant, that this special contract could not be given in evidence under this declaration. Lord LOUGHBOROUGH overruled the objection, with leave to move for a new trial; and assets being proved, there was a verdict for the plaintiff for the value of the cattle.

Graham moved for a new trial. *Partridge* showed cause.

The Court said, as there was no plea of non-assumpsit, the plaintiff must, at all events, have had a verdict on the *plene administravit*, with nominal damages; and now, on a motion for a new trial, whether the special contract might or might not be given in evidence, they would look at the merits; and as no injustice had been done, the rule must be discharged.

Rule discharged.

Indebitatus assumpsit for goods sold and delivered. Plea, *plene administravit*. It appeared that the goods were sold to be paid for on the marriage of the plaintiff, which did not happen till fifteen years after the sale. Objection at the trial, that this being a special contract could not be given in evidence under this form of declaration. Verdict for plaintiff. On motion for new trial held, that whether the form of the declaration was right or not, the Court would look to the merits; and as no injustice had been done, they would not grant a new trial.

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Tuesday,
11th May.

On a new trial,
a fresh notice of
trial is neces-
sary.

BINGLEY v. MALLISON.

NEW trial from the northern circuit. The point determined was, that, on a new trial, a fresh notice of trial is necessary. For want of such notice in this case, a second new trial was granted.

Tuesday,
11th May.

Policy of insurance "at and from *Jamaica* to *Liverpool*, warranted to sail on or before the 1st of *August*," the vessel not sailing before the 1st *August*, held that the risk was not divisible, and that the assured was not entitled to a return of any part of the premium.

MEYER v. GREGSON (a).

THIS was an action for a return of premium, tried before *WILLES, J.*, on the northern circuit. The policy was "at and from *Jamaica* to *Liverpool*, warranted to sail on or before the 1st of *August*, premium twenty guineas per cent., to return eight if the vessel sailed with convoy." The vessel did not sail till *September*, and was lost. The defendant paid eight guineas into court, and the jury apportioned the premium, and gave eight guineas more, allowing four guineas for the risk which the underwriters had run at *Jamaica*. The defendant moved for a new trial, on the ground that the risk was not divisible.

Lee and *Wood* showed cause, and endeavoured to distinguish this case from *Lorraine v. Thomlinson* (b), *Tyrie v. Fletcher* (c), and *Birman v. Woodbridge* (d). If in any case there can be an apportionment, it is in a case like the present, where no part of the voyage has been risked, and where the value of the risk at *Jamaica* is well known.

Sir *T. Davenport* and *Wilson*, contra.

LORD MANSFIELD.—It would be endless to go into inquiries about the risk at *Jamaica*: it appears on this evidence to have been different on different sides of the island. In *Stevenson v. Snow*, the Court went on its being expressed by the parties to be two voyages; the usage, which they all

(a) *S. C. Park, Ins.* 527, 6th ed.

(b) *B. R., H.* 21 G. 3, ante, vol. ii. p. 583.

(c) *B. R., E.* 17 Geo. 3, Cowp. 666.

(d) *B. R., T.* 21 G. 3, ante, vol. ii. p. 781.

knew, being to have convoy only from *Portsmouth*, and the risk from *London* to *Portsmouth* being exactly known. Unless it be an absolute void contract, the premium is not to be returned. It is sufficient that the risk began.

WILLES, *Justice*.—I think the risk ought to be apportioned.

ASHURST, *Justice*, agreed in opinion with Lord MANSFIELD.

BULLER, *Justice*.—The parties have not considered it as two risks, nor estimated the risk at *Jamaica*. The Court cannot do it for them. In all the insurances from *Jamaica*, the insurance is *at and from*. In many instances, the voyage has not begun, and yet there never was an idea of the premium being returned.

Rule absolute (*e*).

(*e*) Vide *Long v. Allen, B. R., E. 25 Geo. 3, post, vol. iv.* and the notes there. See also the observations of Mr. *Justice PARK* on this case. *Insurance*, p. 527, *et seq.* 6th ed.

The following cases on this subject, which have occurred in the *American* courts, are given from Mr. *Phillips's* excellent "*Treatise on the Law of Insurance*. Boston, 1823," p. 509.

"An open policy was made on the cargo of a vessel until her return to the *United States*, as interest might appear at a rate of premium of 15 per cent. for six months. It appeared that there was a cargo on board, at different times, of the value of 5000 dollars, 1800 dollars, and 2500 dollars. It was held in the Circuit Court of the *United States*, that the premium must be estimated on the amount of risk, and for the time during which it was at risk, though for less than six months, and this was said to be according to the general usage. *Pollock v. Donaldson*, 3 *Dall.* 570.

"In a case which occurred in *Pennsylvania* on a policy

upon a cargo from the *United States* to *Havannah* and back, it was stipulated in the policy, that 'if bills were remitted back for the whole or a part of the sum insured, a return of seven and a half per cent. on the amount so remitted' should be made. Nothing was either remitted or shipped homeward. Chief-Justice TILGHMAN said, 'Where the voyage is entire, and the risk has once commenced, there shall be no return of premium. But where, *by the course of trade*, or the agreement of the parties, the voyage is divided into distinct parts, and on one of the parts no risk has been run, there shall be an apportionment of the premium. A voyage may be entire, though a ship is to go to different places, and take in a number of different cargoes. But if, in the contract, there are certain contingencies introduced, which at certain periods of the voyage may operate to make the insurance void, it is considered that the voyage may be supposed to have been divided, in the contemplation of the parties, into distinct

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parts,' for which he refers to the opinion held by Lord MANSFIELD in the above case of *Stevenson v. Snow*. And it was held by the Court, that the stipulation for the return of seven and a half per cent. was a division of the risk in this policy; and that the assured was entitled to a return of that amount. Mr. Justice YEATES dissented from this opinion. *Donath. v. In. Co. of N. A.* 4 Dall. 463.

"In *New York*, the Court seem to have been of opinion, that where the risk is *at and from* a place, and attaches *at* such a place, there can be no return of any part of the premium, though the risk *from* the place should never be run by the insurers. The Court say, 'The difficulty of apportioning the risk is insurmountable. It is impossible to ascertain the degree of risk, *without travelling out of the contract*, or how much of the premium shall be apportioned to each different part.' *Col. Ins. Co. v. Lynch*, 11 Johns. 239. The question of usage was not considered.

"It has been held in *Massachusetts*, that a usage of the particular place where the policy is made will not be a ground to claim an apportionment and return of premium. A policy was made on a cargo for a voyage from *Boston* to *Archangel* and back to *Boston*, and the insurers were to take the risk on shore as well as on board. The property insured outward was valued at 4600 dollars. The cargo arrived safe, but on account of the state of the markets was not sold, and the vessel returned without any property on board belonging to the assured. It was proved to be the invariable practice of all the insurance offices in *Boston*, public

and private, to return a portion of the premium on such policies when the vessel returned without any cargo belonging to the assured, and that one-half of the premium, except one per cent., or one-half per cent., on the amount insured, was returned, unless the risk was greater on the outward than on the homeward voyage, in which case the sum returned was in the proportion of the part of the risk not run. It was known at the several insurance offices that, notwithstanding this usage, there had been sundry decisions of the Court, establishing the right of the underwriters to the whole premium. It was also the usage to return a part of the premium on a vessel insured outward and homeward that, on arriving at the foreign port of destination, sailed on another voyage. A president of one of the insurance companies said, that, in regard to the premium, he considered a policy out and home to be the same as two distinct policies. It was urged in behalf of the assured, that the distinct valuation of the outward cargo, as well as the usage above stated, made this a case of two distinct risks. On the other hand, it was argued for the insurers, that the evidence of usage ought not to have been admitted, as it went to control an established principle of law; and that if proof of usage admitted, it should be, of the usage of *Massachusetts*, not of one town, as of *Boston*. The Court said, 'The law applicable to this case is plain, well settled, and generally understood. Evidence of usage is useful in many cases to explain the intention of the parties to a contract. But the usage of

no class of citizens can be sustained in opposition to principles of law.' *Homer v. Dorr*, 10 *Mass. R.* 26.

"The same usage has, however, continued since this decision. The general practice upon this usage shows that there is not any great difficulty in applying

the principle of apportionment. One part of what I understood to be the usage is not stated in the above case, namely, when a loss of whatever kind or amount is claimed and paid, it is not customary to apportion the premium and return a part of it."

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THE KING v. WETHERELL and STEED.

(Reported, *Caldecott*, 432.)

Monday,
17th May.

FAICLAIR v. THRUSTOUT (a).

Monday,
17th May.

RULE to show cause why proceedings in this ejectment should not be staid till the costs of a former ejectment were paid. *Dayrell* showed cause, and stated that this appeared to be a different title, the former ejectment having been on the demise of one person, and this on the demise of him and two others jointly, and cited *Moon* on the demise of *Newman v. James* (b), where a rule of this sort was discharged, it appearing not to be on the same demise.

Cowper, contra.

The Court said it was not sufficient that the demise was different, the title must be different. Here it might or might not, for the new lessors might be trustees.

They gave Mr. *Dayrell* time to get an affidavit that the title was different (c).

(a) *S. C.* cited 1 *Tidd's Pr.* 583, 8th ed.

(b) *T.* 33 & 34 *G.* 3.

(c) See *Doe v. Law, B. R.*, *H.* 25 *G.* 3, *post*, vol. iv., and the note there.

The Court will stay proceedings in a second ejectment until the costs of a former ejectment are paid, though the demises are different, if it does not appear that the title is different.

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Tuesday,
18th May.EDMUNDS and Others, who survived ELIZABETH KENT,
Widow, deceased, v. Cox and Others (a).

Where several jointly claim a sum of money, and the cause of action is referred, and one of the parties so jointly claiming dies, the arbitrator cannot award the sum to be paid to the survivors and the executors of the deceased.

DEBT by the plaintiffs, who survived *Elizabeth Kent*, widow, on a bond given by the defendants to them and the said *Elizabeth Kent*. Plea craving oyer of the bond and condition, which latter was that if the defendants, and every of them, their and every of their heirs, executors, and administrators, for their and every of their parts and behalves, did in all things well and truly stand to, abide by, &c., the award, &c. of *W. W.*, *J. P.*, and *T. K.*, or any two of them, arbitrators, indifferently named, &c., to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action, suits, indictments, prosecutions, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or any of them, so as the said award be made in writing, &c., on or before the 5th day of *November* next ensuing, &c., then the obligation to be void. The plea then proceeded as follows:—The said defendants say that the said plaintiffs ought not, &c., because they say that the said *W. W.*, *J. P.*, and *T. K.*, the arbitrators in the said condition above mentioned, did not, nor did any two of them, make any award between the said defendants, and the said *Elizabeth*, and the said plaintiffs, in the said condition mentioned, according to the form and effect of the said condition, &c., and this, &c. Replication: that after the making of the writing obligatory, and before the 5th of *November*, the said *Elizabeth Kent* died, having made her will, and appointed *M. K.* and *W. E.* executors, who proved the same; that the arbitrators named in the condition took upon themselves the burden of the award, and heard the allegations, &c. of the said plaintiffs, of the said *M. K.* and *W. E.*, executors, &c., and of the said

(a) *S. C. 2 Chitty's Rep.* 432.

defendants; but the said *W. W.* refusing to join with the said *J. P.* and *T. K.* in making the award, the said *J. P.* and *T. K.* did then and there make and publish their award [setting out the award, which amongst other things ordered that the defendants should pay to the plaintiffs, and to *M. K.* and *W. E.*, the sum of £70, in full discharge of all monies, &c. due to *Elizabeth Kent* and the plaintiffs, and that all actions, &c. commenced between the said *E. Kent* and the plaintiffs and the defendants should cease]. Demurrer, assigning for cause that the award ought to have been made between the said defendants and the said *Elizabeth Kent* and the said plaintiffs, and that the replication was no answer to the plea, inasmuch as the award was made after the death of the said *Elizabeth Kent*, and for that the power of the arbitrators to make any award of and concerning the premises ceased upon the death of the said *Elizabeth Kent*. Joinder in demurrer.

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Morgan for the defendants.—The objection is that the power of the arbitrators determined by the death of *Elizabeth Kent*. In *White v. Gifford* (b), it was held that the marriage of a woman who had submitted to arbitration was a revocation of the authority. At common law, the death of a party before judgment abated the suit; and here by the death of *Elizabeth Kent* the authority was revoked. The bond is not single, but to perform an award; and there being no award, there is no breach of the condition.

Bower, contra.—There are no objections to the merits of this award, supposing that it could be made between these parties. The objection is, that the power of the arbitrators was determined by the death of one of the persons named in the submission bond. Nothing is said in the bond that the award shall be made between the parties, so as to give room to object on account of the *wording* of the bond. The spirit of the submission is therefore to be considered. What that is appears from the clause by which the *executors* of the defendants are bound to the executors of the plaintiffs for performance of the award. That executors are entitled to the benefit of an award appears from the case of *Dawney v. Vesey* (c); and that they are bound appears from *Freeman*

(b) *B. R.*, *E. 13 Car. 1*, 1 *Roll. Ab.* 331. (c) *C. B.*, *M. 2 W. & M.* 2 *Vent.* 249.

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v. *Bernard* (d). The reason given, "that the award creates a duty," applies equally to the bond.—A bond creates a duty. Here the causes of action submitted were joint; and if one of the parties died, still the causes of action survived. In the case cited from *Rolle's Abridgment*, a third person, viz. the husband, would have been affected. At all events, the award will only be void as to the party who has died, and good as to the survivors, for it is a joint right or title which was referred.

Morgan in reply.—Suppose there had been but one defendant and he died—could the arbitrator have proceeded to make an award? It is true that the right survives, but then the arbitrators have done wrong, for they have awarded part to the executors.

Lord MANSFIELD.—That is decisive. The award is made for the payment of a certain sum to surviving parties, and to the executors of a deceased party, which executors are not before the Court. There must be judgment for the defendants.

The rest of the Court concurring,
 Judgment for the defendants (e).

(d) *B. R.*, *T.* 9 *W.* 3, 1 *Ld.* *S. C.*; *Dowse v. Cox*, *C. B.*, *Raym.* 247; 1 *Salk.* 69; *Carth.* *E.* 6 *G.* 4, 3 *Bingh.* 20; *Clarke v. Crofts*, *C. B.*, *E.* 8 *G.* 4, 4

(e) See *Rhodes v. Haigh*, *B. R.*, *M.* 4 *G.* 4, 2 *B. & C.* 345; *Bingh.* 143; *M'Dougal v. Robertson*, *Exch. Ch. M.* 8 *G.* 4, 4 *Bingh.* 435; *Watson on Awards*, *v. Jones*, *B. R.*, *T.* 5 *G.* 4, 3 *B. & C.* 144; 4 *D. & R.* 740, 18.

Tuesday,
 18th May.

NEATLEY v. EAGLETON (a).

Where a bankrupt is taken in execution after his certificate is signed, but before it is allowed, and de-

posits the amount of the debt with the sheriff, who thereupon releases him, the Court will not order the sheriff to return the money to the defendant.

T. COWPER showed cause against a rule calling upon the plaintiff to show cause why the sheriff of *London* should not return to the defendant a sum of money paid to him by the defendant under the following circumstances:

(a) *S. C.* cited 2 *Tidd's Pr.* 1049, 8th ed.

The plaintiff having recovered a judgment against the defendant, took him in execution, after a commission of bankrupt had issued against him, and his certificate had been signed, but not allowed. Before the allowance, the defendant, in order to procure his discharge, paid the money into the sheriff's hands. A few days afterwards the certificate was allowed, and the present rule obtained.

Cowper opposed it on the ground, that the sheriff, having let the defendant out of custody, had made himself liable to the plaintiff for the whole sum, in an action of debt for the escape; and the Court was of this opinion.

Rule discharged.

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v.
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THE KING v. THE INHABITANTS OF EDMONTON.
(*Reported, Caldecott, 435.*)

Wednesday,
19th May.

THE KING v. THE INHABITANTS OF SEATON AND BEER.
(*Reported, Caldecott, 440.*)

Wednesday,
19th May.

THE KING v. SALTREN, Esq.
(*Reported, Caldecott, 444.*)

Wednesday,
19th May.

THE KING v. THE INHABITANTS OF NORTH BEDBURN.
(*Reported, Caldecott, 452.*)

Saturday,
22d May.

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Monday,
24th May.

If the principal die after the return of the *ca. sa.*, and before it is filed, the bail are fixed.

FIELD *v.* LODGE (a).

THE defendant died after the *ca. sa.* was returnable, but before it was actually returned and filed. This was a motion to stay the filing, in order to prevent any proceeding against the bail.

Cowper showed cause.—He said, When the writ was returnable, the bail were fixed; and the return, when filed at any subsequent time, related back to the return day.

BULLER, *Justice*, agreed, and cited *Elleswell v. Satchwell*, and *Hunt v. Cox* (b), where DENNISON, *J.*, considered the point as settled, and that the filing of the return was only form.

Sir *T. Davenport*, *contra*, said, the plaintiff in this case had lain by a whole term; but

The Court said, the point was settled, and discharged the rule.

Rule discharged.

(a) *S. C.* cited 2 *Tidd's Pr.* 1148, 8th ed. (b) *B. R.*, *M.* 3 *G.* 3, 3 *Burr.* 1366.

Monday,
24th May.WADHAM *v.* MARLOWE.(Reported, 8 *East*, 314; 2 *Chitty's Rep.* 600.)NELSON *v.* POWELL.

Where an agent, without declaring his principal, purchases goods, the vendor, on discovering the principal, may sue him, though he has debited the agent, and though the principal has remitted money to his agent to discharge the debt.

THIS was an action of assumpsit for goods sold and delivered, tried at *Exeter* before Mr. Baron HOTHAM. The facts at the trial appeared to be these:—The defendant, by one *Thomas* his broker, bought goods of the plaintiff. The invoices were made out in the broker's name for goods delivered to him, and were all paid for except a balance, for

which the plaintiff pressed *Thomas*, who had not declared his principal. One of the plaintiff's letters to *Thomas* was sent by him to the defendant, who, having remitted to *Thomas* sufficient to pay the plaintiff, wrote to the latter and informed him of that fact. After this the plaintiff again called on *Thomas* to pay the money as due from him; but this not being done, the plaintiff brought the present action. The jury having found a verdict for the plaintiff,

Lawrence now moved for a new trial, on the ground that the credit had been given to *Thomas*, and that he alone was liable; but

Lord MANSFIELD held the principal liable whenever he was known, and

The rule was refused (*a*).

(*a*) This case is shortly stated by Lord ELLENBOROUGH, in *Paterson v. Gandasequi*, *B. R.*, *H. 52 G. 3, 15 East, 65*. The statement there given is not altogether correct. It is said, "There a factor made purchases for his principal who made payments to him on account;" but, in fact, the payments on account were made by the factor *Thomas* to the plaintiff. This mistake gave rise to another. "The attorney-general said he believed the case went further, and that the principal there was held liable to the whole amount of the purchases. *LE BLANC, J.*—I should think not: the case can hardly be supported to that extent." In fact the plaintiff only sought to recover the balance.

A case somewhat similar to the above was tried before EYRE, *C. B.*, at the *Winton Summer Assizes*, 1798; when a verdict was found for the plaintiff; and on a motion for a new trial, which came on in *Hilary Term*, 1799, the Court discharged the rule. Lord KENYON, on that occasion, said to the other judges, that when there was no profit to be made by way of an

intermediate contract, if the principal did not furnish his agent with ready money, he would be liable, though he might afterwards supply him with cash to pay the persons with whom he immediately contracted, for he would, in such case, be making contracts for his principal. But if a man should agree with another to execute a contract for him, not as his servant, but as a contractor with him, upon which he was to gain a profit, then the principal would not be liable in case of nonpayment by the person with whom he contracted. In this case, the defendant *Charettier* was a contractor to supply the *French* cartels at *Portsmouth* with provisions, and employed one *Smith* to procure what he wanted, which *Smith* did in his own name, and was debited by the different tradesmen. The defendant had remitted money to *Smith* to pay them, which he did not do, but absconded. As there was evidence that the defendant had gone himself to some of the tradesmen, and had personally undertaken, it was not necessary to state the law on the

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general question to the bar. *Robson v. Charretier*, B. R., H. 39 G. 3.

The law as to the responsibility of principals has been much considered in several modern cases. *Puterson v. Gandasequi* B. R., H. 52 Geo. 3, 15 East, 62; *Addison v. Gandasequi*, C. B., T. 52 G. 3, 4 Taunt. 574; *Waring v. Favenck*, cor. Ld. ELLENB. 1807, 1 Campb. 85; *Seymour v. Pychlau*, B. R., M. 58 G. 3, 1 B. & A. 14.; *Thomson v. Davenport*, B. R., H. 9 & 10 Geo. 4, 9 B. & C. 78. The result of these cases, as stated in the last, is this. If a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may, in the mean time, have debited the agent with it, he may afterwards recover the

amount from the real principal; subject, however, to this qualification,—that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding that knowledge chooses to make the agent his debtor, dealing with him alone, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election, when he had the power of choosing between the one and the other. The mere knowledge that there is a principal, his name not being disclosed, will not prevent the seller from resorting to him, after having debited the agent.

**C A S E S**

**ARGUED AND DETERMINED**

IN THE

**COURT OF KING'S BENCH,**

IN

**TRINITY TERM,**

IN THE

**TWENTY-FOURTH YEAR OF THE REIGN OF GEORGE III.**

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COOPER v. WATSON.

Tuesday,  
15th June.

**T**HIS was an action of covenant on articles of copartnership. The declaration stated that by the articles of copartnership it was covenanted that the copartnership, which was in the trade of a brewer, should continue for the term of eleven years, if the parties should so long live, with a proviso that, if either of the parties should be so minded, on giving six months notice to the other he should be at liberty to quit the trade and mystery of a brewer, and that the party, to whom such notice should be given, might be at liberty to continue the trade on his own account. The declaration then assigned as a breach, that the defendant had carried on the trade on his own account. The defendant pleaded, that he gave six months' notice to the plaintiff, to which plea the plaintiff demurred.

*Bower* for the demurrer.—The partnership was to subsist for eleven years, or until either of the parties should desire to quit the trade. This being a very expensive trade, if either party could determine the copartnership without quitting the trade, an opulent partner might, by continuing the trade separately on his own account, ruin the other.

By articles of partnership, it was covenanted that the trade (of a brewer) should continue for 11 years, with a proviso, that if either of the parties should be so minded, on giving 6 months' notice to the other he should be at liberty to quit the trade and mystery of a brewer, and the other party should be at liberty to continue the trade on his own account. Held that the party giving notice could not carry on the trade on his own account.

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The true construction of the covenant is, that the party giving notice shall not continue the trade, as appears from the words "be at liberty to quit the trade and mystery of a brewer."

*Wood, contra*, endeavoured to show that the meaning of the proviso was merely that the party giving notice should quit the trade and mystery as carried on in partnership.

Lord MANSFIELD told *Bower* that he need not trouble himself to reply. He said that the meaning of the parties was very plain; it was that the assistance in the trade should not be given to any other than the plaintiff.

BULLER, *Justice*.—The words are most clear; "quitting the trade or mystery" means that he must quit the trade altogether.

Judgment for the plaintiff.

Tuesday,  
 15th June.

PHILIPS v. HARDINGE (a).

The Court will not grant a rule for an imparlance; the defendant may take it without leave.

*BALDWIN* moved for a rule to show cause why the defendant should not have an imparlance. The last day for delivering declarations this term was *Saturday*, and this declaration was delivered on *Sunday*.

Lord MANSFIELD.—The Court never grant such a motion. If you are entitled to an imparlance, you may take it without leave.

Motion denied.

(a) *S. C.* cited 1 *Tidd's Pr.* 473, 8th ed.

Wednesday,  
 16th June.

THE KING v. JAMES.  
 (Reported, *Caldecott*, 458.)

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HASLINGTON and Another v. GILL and Another (a).

Friday,  
18th June.

**T**HIS was an action of trover against the sheriff of *Middlesex* for eight cows and a heifer. It was tried at *Guildhall*, before *BULLER, Justice*, at the sittings after last term, when a verdict was found for the plaintiffs, with fifty pounds damages, subject to the opinion of the Court on the following case:

By indenture tripartite, dated the 11th of *October*, 1779, between *John Rhodes* of the one part, *Anne Peach*, widow, of the second part, and the plaintiffs of the third part, reciting that a marriage was intended between *J. Rhodes* and *Anne Peach*, and that part of the personal estate of *Anne Peach* consisted of thirty-four cows and upwards, and that it was agreed between *J. Rhodes* and *A. Peach*, that thirty-two of the most valuable of the said cows, in the opinion of the said *Anne*, her executors and administrators, and one bull, and such other things as were therein after mentioned, should be assigned by her to the plaintiffs upon the trusts after mentioned, the said *Anne Peach*, in pursuance of the said agreement, and in consideration of five shillings, assigned to the said plaintiffs, their executors, administrators, and assigns, all such personal estate of her, the said *Anne Peach*, as consisted of thirty-two of the most valuable of her cows, in the opinion of her, &c., and the increase and produce to arise therefrom, and two of her best horses, and one bull, three featherbeds, &c., to hold to the plaintiffs for ever, on the trusts following:—To permit the said *Anne Peach*, or such person as she should by will appoint, and in default of appointment, her administrators, to keep and enjoy and at her and their own will to sell the said cows and premises, and the increase and produce to arise and be produced from the same, for her and their proper use; and that the said *John Rhodes* should not intermeddle therewith, neither should the same, nor any part thereof, be liable to his control, debts, disposition, or engagements, but be wholly in the power and

By settlement before marriage, 32 cows, &c. and the increase and produce arising therefrom, the property of the woman, are assigned to trustees for her separate use, the husband covenants to permit her to carry on the trade of a cowkeeper for her sole use. After the marriage, the wife, with the profits of her trade, purchases four more cows. Held that the settlement was good against the creditors of the husband, and that the cows purchased after the marriage, are also protected by it.

(a) *S. C. without the arguments of Counsel*, 3 *T. R.* 620 n. (a).

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disposal of the said *Anne Peach*. And the said *John Rhodes* covenanted to the plaintiffs that the said cows, &c., and the increase, benefit, and produce arising from the same, should remain and be for the purposes and trusts before expressed ; and that he would permit the said *Anne Peach* to carry on the trade and business of a cowkeeper and milkseller according to her own will and pleasure, and at such place and places as she should from time to time think proper, for her own sole use and benefit. The marriage was afterwards had ; and the defendants in *July*, 1782, levied an execution at the suit of *H. M'Cluish* against the goods of the said *John Rhodes*, and seized, and after notice given to them of the said settlement sold, eight cows and one heifer, four of which were part of the cattle belonging to the said *Anne Peach* before her intermarriage, and mentioned in the deed of settlement, and the rest of them bought with the money produced by sale of the milk of the cows mentioned in the settlement. The said *Anne Rhodes* is still living.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the whole or any of the cattle. If the whole, the verdict to stand ; if the four cows included in the settlement, a verdict to be entered for £25.

*Wood* for the plaintiffs.—The plaintiffs are entitled to recover the whole. It will be said for the defendants that the settlement was a fraud on the creditors of the husband. There is, however, no fraud stated ; and if there was any, it must be a constructive fraud on the statute of *Elizabeth*. But the marriage was a good consideration for the settlement, and it can make no difference whether the stock was live or dead. It is a common practice to settle money or furniture upon trustees for the separate use of the wife, and even part of the husband's property may be so settled. Nor was it ever considered fraudulent that the wife, living with her husband, should have such property for her separate use. It cannot be a fraud upon the creditors of the husband, for the subject of the settlement never was his property. In Lord *Montfort's* case (*b*) a settlement of this kind was held good even against a person who was a creditor at the time of the settlement made, and though it was the husband's property that was settled.

(*b*) *Cadogan v. Rennell*, B. R., E. 16 Geo. 3, Cowp. 432.

*Baldwin, contra.*—The argument on the other side has not touched the case of the property purchased since the intermarriage. [*Wood.*—The accessory must follow the principal.] These are not usual settlements amongst people in trade, and this case therefore is not governed by *Cadogan v. Kennett*. If the subject matter of the settlement consisted of stock in the funds, it would stand in the name of the trustees, and creditors would not be misled. But here the husband is in the visible possession of the cows, and maintains them, at least it is not stated otherwise in the case, and it is the visible possession which misleads the creditor. As to the latter part of the case, the plaintiffs have no pretence of title to the cows purchased since the marriage. Though the thirty-two cows were vested in the trustees, the produce of them becomes the property of the wife, and as soon as she receives it the trust is at an end.

*Wood* in reply.—It does not appear that the husband ever interfered in the wife's business. In fact he was a stonemason. In case any of the cows died, the loss must be supplied, or the purposes of the settlement would be defeated. How could the loss be supplied, unless by the purchase of new cows from the produce?

Lord MANSFIELD.—By the common law the wife can have no separate property; but in equity women have for ages been protected from the extravagance of their husbands in fair and proper cases. This has been accomplished by the intervention of trustees, and as to the property settled in them the wife is considered a single woman. A court of law must recognize the legal estate in the trustees, otherwise the whole system would be overturned. Fraud indeed vitiates every thing; but here there are no circumstances of fraud, either at the time of the making of the settlement, or in the subsequent carrying on of the trade for the benefit of the wife. There might indeed have been circumstances evidencing the fraud, as if the husband had himself carried on the trade, and kept the cows, and in so doing had contracted debts (c). But here the naked question is, whether or not the husband could enable his wife to carry on a separate trade. As to the other question, I cannot distinguish between the four cows subsequently purchased and the rest.

(c) See this point settled in *Jarman v. Woollston, B. R., F. 30 G. 3, 3 T. R. 618.*

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v.  
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WILLES, *Justice*, of the same opinion.

ASHURST, *Justice*.—Possession alone is not evidence of fraud, and does not mislead, as in the common case of a furnished lodging. If any property can be settled, this may, and the trustees have by the deed the legal property in the increase and produce. If the wife has disposed of the produce, it is as their agent.

BULLER, *Justice*.—Possession alone is not fraud, unless the possession be inconsistent with the deed. The trustees and the wife are one person, and a purchase by her is the same as a purchase by them, unless she went beyond the produce.

*Postea* to the plaintiffs (d).

(d) See *Edwards v. Harben*, *B. R.*, T. 28 G. 3, 2 T. R. 587; *Steel v. Brown*, C. B., M. 49 G. 3, 1 Taunt. 381; *Dawson v. Wood*, C. B., M. 51 G. 3, 3 Taunt. 256; *Benton v. Thornhill*, C. B., M. 57 G. 3, 7 Taunt. 149; *Kidd v. Rawlinson*, C. B. 40 G. 3, 2 B. & P. 59; *Steward v. Lombe*, C. B., H. 60 G. 3, 1 B. & B. 506; *Wordall v. Smith*, 1 Campb. 332.

The mere fact that there has been no change of possession is not conclusive evidence of fraud. *Hoffman v. Pitt*, 5 Esp. N. P. C. 25; *Eastwood v. Brown, Ry. & Moo.*, N. P. C. 312. So, if goods seized under an execution are *bond fide* sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions, if the circumstances under which he has possession are known in the neighbourhood. *Latimer v. Batson*, B. R., M. 6 Geo. 4, 4 B. & C. 652; 7 D. & R. 106.

Friday,  
18th June.

TOTTY v. NESBITT.

(Reported, 3 T. R. 153 (n)).

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GREGORY v. CHRISTIE (a).

Saturday,  
19th June.

**T**HIS was an action on a policy of insurance upon "goods, specie, and effects at and from *London to Madras and China*, with liberty to touch, stay, and trade at any ports or places whatsoever, until the vessel should be arrived at her last loading port in the *East Indies or China*." On the trial it appeared that the plaintiff was the captain of the vessel, and claimed under the insurance £3000, advanced by him for stores in the course of the voyage, and for which he charged respondentia interest. Two questions were made, first, whether an intermediate voyage from *Madras to Bengal* was or was not within the terms of the policy. Secondly, whether the captain's interest as to the £3000 was covered by the words of the policy, "goods, specie, and effects." A verdict having been found for the plaintiff, and a rule for a new trial obtained on the above points,

*Erskine* showed cause.—This is not the case of a private ship. All the ships in the *East India* trade sail under one universal charter-party, and the presidencies of the several governments have a right to call on ships to make such intermediate voyages. In this case the ship arrived too late to go on to *China* in consequence of the monsoons, and therefore the intermediate voyage was not an abandonment of the voyage to *China*. It was highly reasonable that when the ship was too late to pursue her voyage to *China*, the Company should make use of her until the period for accomplishing that voyage returned. Further, it was the meaning of the parties, and was always understood, that intermediate voyages should be covered.

*Bearcroft, contra*.—With regard to the first question, the understanding of the parties is to be collected from the words used in the policy; but if any doubt remains it may be explained by custom and usage. Until the year 1781, the mode of insuring intermediate voyages was by an insurance of an entire voyage out and home, whereby they were in-

Policy "on goods, specie, and effects," at and from *London to Madras and China*, with liberty to touch, stay, and trade at any ports, &c. until the vessel shall arrive at her last loading port in the *East Indies or China*. Held that, by the usage of the *East India* trade, this policy covers an intermediate voyage from *Madras to Bengal*, the vessel arriving at *Madras* too late to proceed that season to *China*.

The words "goods, specie, and effects," by the usage of trade, cover a sum of money advanced by the captain for the benefit of the ship, and for which he charges respondentia interest.

(a) *S. C. Park. Ins.* 14, 66, 6th ed., but without the arguments of counsel.



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CHRISTIE.

sured of course. At that time the words "at and from, and to any ports and places whatsoever and wheresoever, forward and backward," always covered the intermediate voyage; but after the year 1781 voyages were broken into parts, and it became usual to insure outward bound voyages and homeward bound voyages separately. It has been said that there are words in this policy which will apply to intermediate voyages, viz. "with leave to touch, stay, and trade at any ports or places whatsoever." The word *trade*, however, gives a liberty of trading *only in the course of the voyage*, and if the parties meant to insure the intermediate voyage, why did they not make use of the common form of words? There are well known forms of expression which include intermediate voyages, as "in port or at sea, and also in all places and at all times until her arrival at," &c., which are clearly more extensive than backwards and forwards. When the parties abandon the old form of words, and do not use others tantamount, it is plain they did not mean to cover intermediate voyages. With regard to the second question, the captain having disbursed money for the use of the ship, for which he had charged respondentia interest, it would not come under the words in the policy "specie or effects." It was a respondentia or bottomry interest, though not by bond, or at all events in the nature of a respondentia or bottomry interest, and ought to have been insured as such.

LORD MANSFIELD.—I have no doubt in this matter. To understand a policy you must refer to the course of the trade to which the policy relates. According to the course of trade here, if a ship sailing from *England* to *Madras* and *China* arrives at *Madras* too late to go on to *China* that season, the Company employ her in intermediate voyages. Until the year 1781 it was usual to insure the whole voyage by general words; but now the outward and homeward voyages are separated. This is a policy on an outward bound voyage, and in the liberty which it gives to *trade*, as well as to touch and stay, it differs from the usual form of policies. Now if this be confined to trading in the course of the voyage, the intermediate voyages are omitted; but on the face of the policy, independent of the usage, I think the word *trade* comprehends the intermediate voyage, and this construction is confirmed by the usage of the trade. As to the second question, there is a usage known to the parties, under which

they contract. This kind of interest has been usually covered by this form of insurance. On that ground I think the insurance ought to be held sufficient.

ASHURST, *Justice*.—The war was the cause of dividing the policy, for if there were only one voyage, there must have been a much larger premium, which a peace might render unnecessary.

BULLER, *Justice*, cited *Glover v. Bluck (b)*, as an authority upon both points.

Rule discharged (c).

(b) *B. R.*, T. 3 G. 3, 3 *Burr.* Ins. 274; *Lavatre v. Wilson, B.* 1394. *R.*, M. 20 G. 3, *ante*, vol. i. p.

(c) See *Farquharson v. Hunter, B. R.*, H. 25 G. 3, 1 *Marsh.* 284. See also *Preston v. Greenwood, M.* 25 G. 3, *post*, vol. iv.

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JANSON v. THOMAS (a).

Saturday,  
19th June.

THIS was an action upon two bills of exchange payable at sight. At the trial it was objected for the defendant that the bills ought to have been stamped; to which it was answered, that the statute 22 *Geo.* 3, c. 38, the stamp act then in force, excepted bills payable on demand, and that these bills came within the operation of that act. The learned Judge before whom the cause was tried not being of that opinion, the plaintiff was nonsuited. A rule having been obtained for a new trial, on the ground that the bills did not require a stamp,

A bill of exchange, payable at sight, is not a bill payable on demand, within the exception in 22 *Geo.* 3, c. 49. *Quære*, Whether days of grace are allowed on bills payable at sight.

*Erskine* and *Mingay* showed cause, and contended that there was a distinction between bills payable at sight and on demand; that the former were entitled to three days' grace, while the latter were not. They said that the object of the legislature was to except drafts on bankers.

*Bearcroft, contra*.—The principle on which the legislature proceeded was, that where time is got by bills, it will bear a tax, and not otherwise. The words of the act are, *payable on demand*. A bill at sight is payable on demand. It is not clear that bills at sight are entitled to days of grace. A distinction exists between foreign and inland bills. On such foreign bills days of grace may be allowed, but

(a) *S. C.*, cited *Bayley on Bills*, 79, 4th ed.

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not on such inland bills. No case is to be found on the subject.

LORD MANSFIELD.—The act of 22 Geo. 3. lays the duty generally on all bills, with certain exceptions, amongst which bills at sight are not to be found. I believe there is great doubt as to the usage about the three days' grace. I do not like to go upon that ground, but the words of the act are "on demand," and I think that we cannot make a further exception by implication.

ASHURST, *Justice*.—I am of the same opinion. We had better go upon the words of the act than make a precedent which may affect trade.

BULLER, *Justice*.—I think *payable on demand* is the same as *drawn payable on demand*. The other point is doubtful, but it is not new; for in a case before WILLES, C. J., in 16 Geo. 2, a special jury certified that, on bills at sight, three days were allowed. That was an action on an inland bill. I know that now they differ about it in the city, but in general it is taken (b).

Rule discharged.

(b) According to *Beaves*, pl. *Harriott, B. R., T. 2 W. & 256*, and *Kidd (on Bills, 10)*, *M. 1 Show. 164*; *Coleman v. Sayer, B. R. Barnardiston, 303*; *Bayley on Bills, 198*, authorities differ. *Dehors v. 4th ed.*

Tuesday,  
22d June.

In an action by a woman suing as a feme sole, her husband is an incompetent witness for the defendant to prove her marriage.

BENTLEY v. COOKE (a).

THIS was an action of assumpsit by a woman suing as a feme sole tried before BULLER, J. After the plaintiff had proved her case, the defendant called one *James Ramsden*, who proved that he was married to the plaintiff, and produced a copy of the marriage register. On his cross examination, he stated, that he and his wife had been long separated by agreement without deed, and that the plaintiff maintained herself, and allowed him a certain sum yearly. The plaintiff having been nonsuited on the ground of the coverture, a rule for a new trial was obtained on the incompetency of the husband as a witness.

(a) S. C., cited 2 T. R. 265, 269.

*Lee* and *Peckham* showed cause. The husband was competent. He was, in fact, speaking against his own interest, for whatever his wife recovered in that action would become his property. It is said, however, that a husband or wife cannot be a witness for or against each other; but the true reason why the wife is incompetent is that she is supposed to be under restraint. The objection, in this case, cannot be stated, without being answered, "You reject the witness because he is the plaintiff's husband. If he is the plaintiff's husband she cannot maintain the action." The husband was only called to prove the copy of the register, which any person may prove, and the Court will not, under such circumstances, put the plaintiff to the expense of a new trial.

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*Bearcroft, contra.*—The general rule founded on principles of domestic policy is that husband and wife shall not be permitted to give evidence either for or against one another. Cases of violence, as Lord *Audley's* case and some other cases, are exceptions to this general rule, on the ground of necessity, but there is nothing here to bring the case within the exception. In *Broughton v. Harper* (b), it was ruled, that if a man marries a second time, before his first wife dies, his first wife cannot be called to prove her marriage to him. So in prosecutions for bigamy the first wife is not a competent witness to establish the first marriage. *Mary Grigg's* case (c). But, independently of considerations of policy, the husband here is interested. He swears to entitle himself to the action and to the money. It is said that the objection cannot be stated without being answered, for that the objection supposes to be true the fact which the witness is called to prove. But that answer is a fallacy, and would tend to defeat almost every objection on the ground of interest. [BULLER, J.—Supposing the plaintiff to have recovered, would the husband have been entitled to bring another action? Lord MANSFIELD.—I think not: the husband suffers his wife to live apart, and to carry on trade. The defendant knows nothing of the husband.]

Lord MANSFIELD.—There never has been an instance either in a civil or criminal case where the husband or wife has been permitted to be a witness for or against the other,

(b) *Coram Holt*, 2 Lord Raym. 752. (c) *B. R.*, M. 12 Car. 2, Sir T. Raym. 1.

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except in case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury. I think the husband was not a competent witness.

WILLES and ASHURST, *Justices*, of the same opinion.

BULLER, *Justice*.—If this case is to be determined by the abstract general rule that husband and wife cannot be witnesses for or against each other, the witness was certainly incompetent. But if that rule be grounded on the principle of interest, then I think the husband was a competent witness. How is the husband's interest affected here? He is interested to disprove the marriage, because he is liable to maintain his wife. He is interested to disprove the marriage on this occasion, because, if the wife should recover, all that she recovers will be his. In proving the marriage, therefore, he is speaking against his own interest. I cannot think that the verdict in this action would be a bar to another action by the husband for the same cause. Suppose that a wife gets possession of her husband's effects, and sells them, shall she recover the price and her husband be barred? I think the true ground in these cases is laid down in *Abraham v. Bunn* (d), that the interest to exclude must be an interest in the question. As to the general rule, I find it only in criminal cases, and then where the marriage is admitted. Where the marriage is in question, as here, every motive of interest is certainly the other way, because the husband may hurt himself, but cannot do himself any good. However, if the rule is a general one, to be sure it must prevail (e).

Rule absolute.

(d) *B. R.* 4 *Burr.* 2251.

(e) In *The King v. Inhabitants of Cleviger*, *B. R.*, *H.* 28 *G.* 3, 2 *T. R.* 269, GROSE, *J.*, said, referring to the present case, "Mr. Justice BULLER doubted at first, because he thought there was no interest in the party whose testimony

had been admitted, but on further consideration of the subject, I know that he gave in to the opinion of the other Judges upon the general principle which governed them, and he thought the rule a very proper one, as it tended to prevent dissensions amongst families."

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PHILPOTTS *en dem.* PHILPOTTS v. JAMES and Others.

Tuesday,  
22d June.

**T**HIS ejectment was tried at the last *Hereford* assizes, and a case reserved which stated that, by indenture of 30th October, 1746, between *T. Payne*, archdeacon of *Brecon*, and landlord of the rectory of *Llandew*, and *Thomas James*, eldest son and heir of *Meredith James*, reciting a former lease from *T. Payne* to *Meredith James*, the said *Thomas Payne*, in consideration of the surrender of the said lease and of £30, did demise, grant, and to farm let, unto the said *Thomas James* all that the aforesaid rectory of *Llandew*, and all and singular the tithes and premises aforesaid with the appurtenants, in as large and ample a manner as any former tenant formerly held and enjoyed the said premises. To hold to the said *Thomas James*, his heirs and assigns, from the making thereof, for and during the natural lives of the said *Thomas James*, *W. Morgan*, and *Charles Evans*, at a rent of £10.

*Lease pur autre vie, to T. P. and his heirs, of a rectory, tithes, and premises. T. P. died, living cestui que vie, and by his will devised the premises to M. H. J., his heir-at-law (without saying "his heirs") with a direction to renew the lease. M. H. J. died, devising the premises by a will, attested by two witnesses. Held that the heir-at-law of M. H. J. was entitled to the estate pur autre vie.*

The premises demise by the said lease, and in question in this cause, consist of the churchyard of *Llandew*, about twelve acres of glebe, and all the great and small tithes of the said rectory. *W. Morgan*, one of the lives mentioned in the lease, is still living.

*Thomas James* died in 1769, having made his will, duly executed, whereby, after devising the bulk of his estate to his nephew, *Meredith Herbert James*, who was his heir-at-law in strict settlement, and a part of it to him in fee, he devised as follows: "Also I give to my said nephew, *Meredith*, all and singular my freehold lease of the rectory and tithes of *Llandew*, granted to me by *T. Payne*, late archdeacon of *Brecon*, for the term of three lives, who are all now living, whereof my own life is one; and it is my will and desire, and I do hereby recommend it to my said nephew, *Meredith*, that after my decease he will renew the said lease, and put in his own or some younger life therein in my room," &c.

He also devised to his nephew, *Meredith*, the residue of his estate, real and personal, and made him his executor.

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*Meredith H. James* having proved the will, and being in possession of the said freehold lease, married *Jane Wilkins*, and afterwards died without issue in *Barbadoes*, having first made his will, dated *May*, 1774, attested by two witnesses only; whereby, after payment of debts and funeral expenses, he gave all the rest of his estate, real and personal, in *Great Britain* and *Barbadoes*, to his beloved wife, *Jane James* (the present defendant), to her and her heirs for ever, and made her executrix. In *December*, 1777, *Jane James* obtained probate of the said will, *Meredith H. James* left his two sisters, *Rebecca* and *Anne James*, his coheirresses at law. *Rebecca* intermarried with *T. Philpotts*, and is since dead, leaving the lessor of the plaintiff her eldest son and heir at law. *Anne James* intermarried with *Charles Collins*, and is now living, and the said *T. J. Philpotts*, the lessor of the plaintiff, and the said *Anne Collins*, are also coheirs at law of the said *T. James*. The question for the opinion of the Court was, if the lessor of the plaintiff was entitled to recover a moiety of the said leased premises in question?

*Bower*, for the plaintiff. The plaintiff is clearly entitled to a moiety. Though tithes are an incorporeal hereditament, they were at common law the subject of special occupancy, 2 *Roll. Ab.* 151 (O); and, moreover, here an estate which is capable of general occupancy is joined with the incorporeal hereditaments, and then, according to *Holden v. Smallbrooke* (a), the grant does not determine as to the incorporeal hereditaments. It is said by *FLEMING, C. J.*, in *Bowles v. Poor* (b), that where a rent is granted *pur autre vie* to a man and his heirs, the heir does not take as heir by descent, but as heir *nominatim*, and as by way of limitation only, and not in any other manner; but the more correct doctrine is laid down by *VAUGHAN, C. J.*, in *Holden v. Smallbrooke*, that "the heir has it not as special occupant (as the common expression is), for if so, such heir were an occupant, which he is not, for a special occupant must be an occupant; but he takes it as heir, not of a fee, but of a descendible freehold, and not by way of limitation as a purchase to the heir, but by descent." The circumstance mentioned by *VAUGHAN*, that, in case of an abatement, the

(a) *C. B.*, *H.* 19 & 20 *Car.* (b) *B. R.*, *M.* 8 *Jac.* 1, 1  
 2, *Vaugh.* 202. *Buls.* 137.

heir should recover by a writ of *mort d'ancestor* is conclusive (c). So where the point was, whether the heir of a special occupant should inherit by the custom of borough *English*: *Per* HALES, C. J.—“Such heir is in by descent, and his grant over shall bind his heir. It is a freehold descendible where he shall not have age; nor will descent thereof take away entry, being an estate of inheritance, but the same as an estate tail.” *Baxter v. Dowdswell* (d). That such an estate *pur autre vie* is considered as real estate, where it is limited to a man and his heirs, appears from several cases. *Marwood v. Turner* (e), *Pearson v. Shore* (f).

Then, supposing this property to be the subject of special occupancy, and to be descendible to the heir, it will be clear that the plaintiff is entitled, unless some change is made by the will of *Thomas James*. By that will the estate is devised to *Meredith James*, without mention of his heirs; but as the original grant was to *Thomas James* and his heirs, that circumstance is immaterial, since the plaintiff is one of the heirs at law of *Thomas James*, the original grantee, and as such within the grant. Neither the statute of frauds, 29 Car. 2, c. 3, nor the 14 Geo. 2, c. 20, § 9, apply to this case, as they only carry the estate to the executors, where no person is described as special occupant.

*Richards, contra.*—This is a question between the real and personal representatives of *Meredith H. James*, and the latter are entitled. *Meredith H. James* took nothing by descent. An estate *pur autre vie* to a man and his heirs is not properly a descendible freehold. It is not an estate of inheritance, nor has it the incidents of an estate of inheritance, as dower, courtesy, &c. Till the passing of the statute of frauds it was not assets. It is not entailable, *Walsingham's case* (g); nor does the descent of it toll an entry, *Co. Litt.* 239. That an estate of this kind may be limited to executors, shows that it cannot be an estate of inheritance, 2 Roll. Ab. 151, (R. pl. 2), recognized by Lord HARDWICKE (h). In *Elvis v. Archbishop of York* (i), it is said

- (c) But see 2 Plowd. 556. (g) Scacc. H. 15 Eliz., 2  
(d) B. R., E. 27 Car. 2, Plowd. 556.  
3 Keb. 475. (h) 3 Atk. 467.  
(e) Canc. H. 1732; 3 P. (i) B. R., E. 17 Jac. 1, Hob.  
Williams, 166. 323.  
(f) 1 Atk. 480.

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that this estate is a fictitious and not a true descendible estate, and that a grant to *J. S.* and his heirs is no fee but a special occupancy.

These authorities show that the heir does not take *qua* heir, and that this is something very different from an estate of inheritance.—*Meredith H. James* took as an occupant marked out by the grant, but not as heir; the word “heirs” is nothing more than a description, *Low v. Burron* (*k*); *Chaplin v. Chaplin* (*l*); *Williams v. Jekyll* (*m*); and on the death of *Meredith H. James* his executors are entitled under the statute of frauds. It is expedient that the estate should go to the executors, and be assets, as the statute has provided, and the Court will lean in favour of the personal representative.

LORD MANSFIELD.—The words of the will of *T. James* are general: he gives *all his freehold lease*. It is the same as if he had added “heirs.”

WILLES, *Justice*.—The statute prefers the heir, and it is only where there is no special occupant that it goes to executors, and in the hands of both it is assets.

ASHURST, *Justice*, of the same opinion.

BULLER, *Justice*.—*Quacunqve via*, the plaintiff must recover. As a descendible freehold I should think the heir in by better title. There is certainly a difference in the books as to the nature of this estate; but the opinion of *Vaughan*, which is recognized by DE GREY, *C. J.*, in *Doe v. Martin* (*n*), is the better opinion. The plaintiff therefore takes as heir of a descendible freehold. If it were necessary to go farther, I agree with the rest of the Court that the estate is sufficiently given by the will. Besides the words of the devise, there follows a direction to renew, which must have been a renewal of the same estate.

Judgment for the plaintiff (*o*).

(*k*) *Canc. E.* 1734, 3 *P.* (*n*) *C. B., E.* 17 *G.* 3, 2  
*Williams*, 262. *W. Black.* 1150.

(*l*) *Canc. T.* 1735, 3 *P.* (*o*) See *Doe dem. Jeff v.*  
*Williams*, 368. *Robinson, B. R., E.* 9 *Geo.* 4,

(*m*) *Canc. M.* 1785, 2 *Ves.* 8 *B. & C.* 296.  
*Sen.* 681.

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SYDENHAM v. RAND (a).

Tuesday,  
22d June.

**BURROUGH** showed cause against a rule for an attachment against a witness for not appearing according to his subpoena. The facts were that the subpoena was to appear at a former sittings, and the cause having been made a *remanet*, a notice in writing was given to the witness to attend at the sittings after last term.

When a witness is subpoenaed to attend at the sittings, and the cause is made a *remanet*, the subpoena must be resealed and re-served, and if the witness is only served with a notice to attend at the last sittings, the Court will not grant an attachment.

**Wood** for the rule, contended that the witness had made no objection to the sufficiency of the notice, and that the common practice was to give such notice, to save the expense of a fresh subpoena; but the *Master* saying that the usual way was to seal the subpoena over again and serve it anew, the Court discharged the rule, saying the complaint was, that the witness had not obeyed the writ, whereas, in truth, he had only disobeyed the notice.

Rule discharged.

(a) S. C., cited 2 *Tidd's Pr.* 855, 8th ed.

HAWKES v. SANDS (a).

Friday,  
25th June.

**MOTION** to discharge the defendant on common bail, he having become bankrupt and obtained his certificate. The affidavit on which the rule was obtained stated only that the cause of action accrued before the commission issued; but on the deposition, and on the affidavits on the other side, it appeared that the note which was the cause of action was given on the 27th *May*; that on the 26th the defendant ordered his servant to deny him, and that on the 28th he was accordingly denied.

Where a trader gave orders to be denied on the 26th *May*, but was not in fact denied till the 28th. Held that there was no act of bankruptcy till the 28th.

*Bearcroft* showed cause.—*Mingay, contra.*

The Court were clear that a debt accruing before the commission, but after the act of bankruptcy, was not by law proveable. But they were also clear that under the circumstances of this case the act of bankruptcy was not committed

(a) S. C., cited *Cooke's B. L.* 90, 8th ed.

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till the 28th; (though *Bearcroft* pressed very much that the keeping house with intent to delay the creditors must have begun when the order to deny was given.)

Rule absolute (b).

(b) But in *Lloyd v. Heathcote*, C. B., M. 1 G. 4, 2 B. & B. 388; 5 B. Moore, 129 S. C., it was held that a beginning to keep house with an intent to delay creditors is an act of bankruptcy, though no creditor is actually denied. See also *Harvey v. Ramsbottom*, B. R., M. 3 G. 4, 1 B. & C. 55; 2 D. & R. 142.

Saturday,  
28th June.

THE KING v. THE INHABITANTS OF BRADNICH.

(Reported, *Caldecott*, 461.)

Monday,  
28th June.

ISACCS v. WINDSOR (a).

Where the defendant is under terms to take short notice of trial for the last sittings in term, he is not bound to take short notice for the sittings after term.

THE defendant was under terms to take short notice of trial for the last sittings in *Easter Term*. Plaintiff gave no notice for those sittings, but gave short notice for the sittings after term, and defendant not attending, plaintiff had a verdict.

*Mingay* moved to set aside the verdict, on the ground that defendant, though under terms to take short notice in term, was not obliged under these terms to take short notice after term; and the Court, after consulting the *Master*, were of that opinion.

*Peckham* and *Wood*, against the rule, then contended that in fact there was full notice for the sittings after term, there having been thirteen days, which was more than sufficient. But on inquiry it appeared that though there were thirteen days from the notice to the time the cause was actually tried, there was not sufficient notice to the first of the sittings, which the Court held to be necessary.

Rule absolute.

(a) S. C., cited 2 *Tidd's Pr.* 817, 8th ed.

1784.

ANONYMOUS (a).

Monday,  
28th June.

**GIBBS** obtained a rule to set aside a judgment on payment of costs.

Sir *T. Davenport* showed cause, and consented to the rule being absolute, on giving plaintiff judgment of the term.

*Gibbs* contended that the Court would only put the plaintiff in the same situation as if the irregularity for which the judgment had been signed had not been committed, in which case plaintiff could only have gone to trial after term, and had his judgment next term.

But the Court said the rule was to put him in the same situation as if the judgment had not been set aside, and as he might have executed his writ of inquiry so as to have judgment of this term, Sir *Thomas's* proposal was reasonable.

Where a judgment by default is set aside on payment of costs, the plaintiff is to be placed in the same situation as if it had not been set aside.

(a) *S. C.*, cited 1 *Tidd's Pr.* 615, 8th ed.

CAWTHORNE v. THOMPSON and Another (a).

Monday,  
28th June.

**ACTION** for an assault. One of the defendants pleaded, and the other let judgment go by default. There was a verdict for the defendant who pleaded, and 1*s.* damages were assessed against the other. *Mingay* moved on an affidavit that both the defendants had agreed to consolidate the costs; that the plaintiff should only have taxed to him the costs, if any that should remain as a surplus, after deducting the costs payable to the defendant, who had got the verdict.

*Bearcroft* showed cause, and cited *Mordecai v. Nutting* (b).

The Court distinguished that case, as there was no agreement, as in the present, to consolidate the costs. They thought the application a reasonable one, and made the

Rule absolute.

In an action for an assault against two defendants, they agreed to consolidate the costs. One let judgment go by default, and the other pleaded. After verdict for the latter, and 1*s.* damages against the former, the Court allowed the costs to be set off.

(a) *S. C.*, cited 2 *Tidd's Pr.* 1029, 8th ed.

(b) *C. B.*, *M.* 23 *G.* 2, *Barnes*, 145.

1784.

Tuesday,  
29th June.

CARMICHAEL v. CHANDLER (a).

Where the defendant neglects to put in and perfect bail, and the plaintiff omits to declare within two terms after the return of the writ, he is not out of Court, but may take an assignment of the bail bond.

THIS was an action on a bail bond against the defendant in the original action. The declaration stated an alias bill of *Middlesex* of T. 23 Geo. 3, returnable on *Thursday*, after the morrow of *All Souls*, delivered to the sheriff on the 18th of *July*. That the defendant was arrested the same day, and that the bail bond also was given the same day by the defendant and two others, *Toroutbeck* and *Fitz*, for appearance at the return of the writ. The assignment to the plaintiff was stated to have been on the 30th *April*. Plea that by the rule and practice of the Court, the plaintiff at and after the return of the bill of *Middlesex* in the declaration mentioned, might have delivered a declaration *de bene esse* against the defendant in the said Court, upon the said process; and that the plaintiff did not deliver any declaration *de bene esse* against the defendant; nor did he declare against the defendant in the said Court in any manner whatsoever; nor were any proceedings whatsoever had in the said Court upon or by virtue of the said precept, before or at the end of *Hilary Term* next, after the return of the said precept; nor did the plaintiff within that time in any manner whatsoever prosecute the said precept against the defendant; neither hath the defendant appeared or given bail to or upon the said precept, and that by reason thereof, and by the usage, course, and practice of the said Court, no proceedings after the end of the said *Hilary Term* could be had on the said precept against the defendant at the suit of the plaintiff; but upon the expiration of the same term, the plaintiff was out of Court upon the said precept, nor could he further prosecute the same. And that the said supposed assignment of the said writing obligatory in the declaration mentioned, was not made until after the end and expiration of the said *Hilary Term* next after the return of the said precept, and until the plaintiff was out of Court, &c., whereby the said supposed assignment was and is void in law; and this he is ready to verify. General demurrer and joinder.

*Chambre* for the defendant, contended that the plaintiff

(a) S. C., cited 1 *Tidd's Pr.* 299, 8th ed.

could not take an assignment of the bail bond at a time when he was out of Court, according to the rules of the Court. He cited *Sparrow v. Naylor* (b), and *Merryman v. Carpenter* (c).

*Shepherd, contra.*—No cause is out of Court till one of the parties is entitled to have the judgment of the Court, which the defendant here was not. The assignee of the sheriff is put in the same condition with the sheriff by the statute, 5 *Anne*, c. 16. No new bar was created by that statute, and it was never thought to be a bar against the sheriff, that he sued on the bail bond two terms after the return of the writ without process on it. This would enable the defendant, by his non-appearance, to defeat the very bond which was given to procure his appearance. Before the statute, 5 *Geo. 2*, c. 27, which enabled the plaintiff to file common bail, he had no method in any case of bringing the defendant actually before the Court. But if it were an irregularity to take an assignment of the bail bond in this stage, it is not a matter to be pleaded, but application must be made to the Court for relief. He denied the doctrine in *Sparrow v. Naylor*.

*Chambre*, in reply, admitted that, in the original action, the relief must be upon motion; but he contended that, in this action, a plea was proper, because the proceeding was void, being founded on an irregularity.

The Court agreed that the plea was not a bar, and that the decision in *Sparrow v. Naylor* could not be supported (d). BULLER, J., said, that the bail were not deprived of the protection of the Court, for they may come in at any time to say that nothing is due from the defendant. And he said that a cause is not out of Court until two terms after the defendant's appearance (e).

Judgment for the plaintiff (f).

(b) *C. B.*, H. 13 G. 3, 2 term after it is returnable, it seems that the plaintiff cannot afterwards regularly take an assignment of the bail bond. 4 *W. Blackst.* 876.

(c) *B. R.*, M. 20 G. 2, 2 afterwards regularly take an assignment of the bail bond. 4 *Str.* 1262.

(d) But where the plaintiff is completely out of Court, by not declaring in the original action within a year after the return of the writ, or in the *Common Pleas*, before the end of the vacation of the second *Taunt.* 715, 1 *Tidd's Pr.* 299, 8th edit.

(e) See *Worley v. Lee*, B. R., M. 28 G. 3, 2 T. R. 112; *Penny v. Harvey*, B. R., H. 29 G. 3, 3 T. R. 123; *Sherston v. Hughes*, B. R., M. 33 G. 3,

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5 T. R. 35; *Parsons v. King*, B. R., M. 37 G. 3, 7 T. R. 7; *Cooper v. Nias*, B. R., M. 60 G. 3, 3 B. & A. 271.

(f) In a note to Mr. Wilson's report of this case, it is said, "*Quære*, If the Court did not say that the practice of the Court was never pleadable, but a subject of motion." As

to this, see *Dudlow v. Watchorn*, B. R., T. 52 G. 3, 16 East, 39; *Warmsley v. Macey*, C. B., H. 1 & 2 G. 4, 5 B. Moore, 168; *Cherry v. Powell*, B. R., H. 2 G. 4, 1 D. & R. 50; *Sandon v. Proctor*, B. R., H. 8 & 9 G. 4, 7 B. & C. 800.

Tuesday,  
 29th June.

THE KING v. COODE and Others.

(Reported, *Caldecott*, 464.)

Tuesday,  
 29th June.

HOOPER and Another v. LEACH and Another.

The ecclesiastical court has power to compel churchwardens to deliver in their accounts, but has no jurisdiction to examine them.

**LUDERS** moved for a prohibition to the *Ecclesiastical Court of Exeter*, in a suit instituted to litigate some particular articles in the plaintiffs' accounts as churchwardens of C. The plaintiffs had been cited to exhibit their accounts in the *Ecclesiastical Court*, and the defendants gave in allegations, objecting to two items in the account, which were incurred by defending a suit. The plaintiffs alleged that the suit was undertaken by the directions of the parish, and that the account exhibited was a true account, and a copy of the original account entered in a parish book, with the original account, had been approved by the parishioners at a public meeting called for the purpose of settling the accounts. The defendants denied the direction and approbation of the parish, and the justice of defending the suit, and the *Chancellor* gave judgment against the churchwardens, who now moved for this prohibition to prevent the *Ecclesiastical Court* from proceeding to enforce the sentence. *Luders* cited *Wainwright v. Bagshaw* (a), and *Adams v. Rush* (b)

*Fanshawe*, for the defendants, contended that the plain-

(a) B. R., E. 7 G. 2, 2 Str. 974.

(b) B. R., T. 13 Geo. 2, 2 Str. 1133.

tiffs came too late after sentence, unless it appears on the libel that the Court had no jurisdiction. *Full v. Hutchins* (c). It certainly had jurisdiction as to the churchwardens' accounts if not passed, and it does not appear that they have been properly passed, for the defendants deny it in their answer. There is also another objection, that whenever a prohibition is applied for on collateral matters, the suggestion must be by affidavit.

The Court admitted the general grounds taken for the defendant, but said it undoubtedly did appear on the proceedings, though not upon the libel, that the accounts had been delivered in, and then the two cases cited on the other side were decisive to show that the *Ecclesiastical Court* has no jurisdiction to examine these accounts, when delivered, but only to compel the churchwardens to deliver an account.

Rule absolute (d).

- (c) *B. R., E. 16 G. 3, Cowp.* (e) *Burns' Eccl. Law, 412, a,*  
422. *Tyrwhitt's edit.*  
(d) See *Leman v. Goulty,*  
*B. R., H. 29 G. 3, 3 T. R. 3.*

1784.  
HOOPER  
v.  
LEACH.





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